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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CLIFFORD CHARLES FOWLER,

Petitioner,

v.

LARRY CRAWFORD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the strict-scrutiny standard embodied in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), § 3 (42 U.S.C. § 2000cc-1) requires the government to demonstrate that it seriously considered less-restrictive alternatives to the challenged policy.

2. Whether, particularly at summary judgment, RLUIPA's text—requiring that it "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the] Act and the Constitution"—can be reconciled with this Court's instruction that "due deference" be given to prison officials.

PARTIES TO THE PROCEEDING

Petitioner is Clifford C. Fowler, an inmate at the Jefferson City Correctional Center.

Respondents are the Missouri Department of Corrections and various officials at the Missouri Department of Corrections: Larry Crawford, Tom Clements (as successor of Terry Moore), Mike Kemna (as successor of Steve Long), David Dormire, Arthur Wood, and Robert Joe Gibson.

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OPINION BELOW

The opinion of the court of appeals (App., *infra*, at 1-27) is reported at 534 F.3d 931. The opinion of the district court (App., *infra*, at 28-44) is unreported.

JURISDICTION

The Eighth Circuit filed its decision on July 25, 2008. A timely petition for rehearing was denied on September 29, 2008 (App., *infra*, at 46). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1, *et seq.*, 42 U.S.C. § 1983, and 28 U.S.C. § 1331 (general federal question jurisdiction).

STATUTORY PROVISION INVOLVED

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") provides in relevant part:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution...unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

* * *

> If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

* * *

> This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

42 U.S.C. §§ 2000cc-1(a); 2000cc-2(b); 2000cc-3(g).

STATEMENT

This case raises important, recurring questions relating to the interpretation of § 3 of the Religious Land Use and Industrialized Persons Act of 2000 ("RLUIPA"), including the level of judicial scrutiny required, the burden of proof imposed on the

government, and the amount of "due deference" accorded to prison officials.

Congress enacted RLUIPA in 2000, in response to this Court's invalidation of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1, *et seq.*, in *City of Boerne v. Flores*, 521 U.S. 507, 532-536, 117 S.Ct. 2157 (1997). *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 714, 125 S.Ct. 2113, 2118 (2005). In addition to land-use regulation, RLUIPA establishes religious protection for institutionalized persons. *See* 42 U.S.C. § 2000cc-1. At issue in this case is § 3 of RLUIPA, which states, in relevant part:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution...unless the government demonstrates that the imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). The text of RLUIPA provides that the prisoner bears the initial burden to demonstrate that the governmental restriction "substantially burdens" his "religious exercise." *Id.* at §§ 2000cc-2(b) and 2000cc-3. After the prisoner meets this burden, "the government shall bear the burden of persuasion on any element of the claim." *Id.* at § 2000cc-2(b). And RLUIPA applies broadly to favor free religious worship; to this effect, § 2000cc-

3(g) provides, "this chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* at § 2000cc-3(g).

In *Cutter v. Wilkinson*, 544 U.S. 709, 125 S.Ct. 2113 (2005), this Court, in *dicta*, advised that RLUIPA must "be applied in an appropriately balanced way, with particular sensitivity to security concerns[,]" and that "'due deference'" should be given to the "experience and expertise of prison and jail administrators" when evaluating a challenged policy. 544 U.S. at 722-23, 125 S.Ct. at 2123 (quoting Joint Statement S7775). The seemingly irreconcilable positions taken by RLUIPA's text[1] and this Court's (and Congress's) instructions have engendered conflict and confusion in the lower courts, as reflected in the decision below.

The conflict, in a broad sense, concerns the level of scrutiny to be applied under RLUIPA. In contrast to the text of RLUIPA and the opinions of the First, Third, and Ninth Circuits, the Eighth Circuit interprets RLUIPA's strict-scrutiny standard as the functional equivalent of the *Turner* test,[2] a

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[1] Requiring strict scrutiny and insisting that the Act be construed "in favor of broad protection of religious exercise[.]"

[2] *Turner v. Safley*, 482 U.S. 78 (1987). In the absence of a Congressional act such as RLUIPA, *Turner* provides the applicable standard to determine whether a prison regulation violates an inmate's constitutional rights, including the right of free exercise under the First Amendment. *Turner* sets forth four factors to be balanced in determining whether a prison regulation is reasonably related to legitimate penological interests or instead unconstitutionally burdens an inmate's rights:

form of rational-basis review that applied to free-exercise claims before RLUIPA imposed strict scrutiny. Under this lesser standard of review, the allocation of burden of proof differs from that contemplated by the text of RLUIPA and the application of strict-scrutiny in other contexts. Thus, different results are reached depending on which precedent is applied to interpret this important act of Congress. This Court should, therefore, clarify which interpretation is proper.

A. Factual Background: *Fowler v. Crawford*

Petitioner Clifford C. Fowler ("Fowler") is a Native American inmate at the Jefferson City Correctional Center ("JCCC") in Jefferson City, Missouri. Fowler seeks to practice an essential element of his Cherokee faith through the use of a sweat lodge.[3] That Fowler's religious belief is

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(1) Whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it";

(2) Whether there are "alternative means of exercising the rights that remain open to prison inmates";

(3) Whether "accommodation of the asserted constitutional right" will "impact ... guards and other inmates, and on the allocation of prison resources generally"; and

(4) Whether there is an "absence of ready alternatives" versus the "existence of obvious, easy alternatives.'"

Turner, 482 U.S. at 89-90.

[3] A sweat lodge is a permanent, domed structure made of willow poles that is covered with blankets or a tarp during use. In an area outside the lodge, participants create a fire for use in the ceremony. One participant acts as a firekeeper and

sincere, and that the sweat-lodge purification ceremony is central to his faith—indeed, prerequisite to all other forms of worship—is uncontested in this case.[4]

Fowler commenced litigation against the Missouri Department of Corrections ("MDOC"), *pro se*, on July 11, 2005, seeking transfer to another maximum-security prison in Potosi, Missouri ("Potosi"), where MDOC had operated a sweat lodge without incident for 14 years or, alternatively, seeking construction of a sweat lodge at JCCC. Just months after Fowler commenced this suit, MDOC prohibited sweat lodges at all MDOC facilities and

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tends the fire. A sacred altar is also set up outside of the lodge to hold various items used during the ceremony, such as a buffalo skull, a prayer pipe, and deer antlers. Inside the lodge, the participants pour water from a dipper, such as a gourd, onto the rocks, creating steam. This initiates a round, with the entire ceremony typically lasting four rounds. During each round, prayers and songs are shared between the participants, with different prayers and songs at each round, and each round lasting fifteen to twenty minutes. Usually, the water pourer starts with a prayer, and this continues around the circle. After each round, the doorway is opened, and a pipe might be brought in and passed around to smoke. Alternatively, smoking may occur outside of the lodge. To begin the next round, additional rocks are brought to the door opening by the firekeeper and the process starts again.

[4] The sweat-lodge ceremony is a form of purification and penance, and, as MDOC's documents acknowledged, a central tenet of the Native American religion. Fowler needs access to a sweat lodge to purify himself before he may pray to the Great Spirit. Purification in the sweat lodge is a prerequisite to the practice of other aspects of Fowler's religion and, absent purification, he cannot meaningfully engage in the practice of his faith.

shut down the Potosi sweat lodge. This policy change was prompted by security concerns unrelated to the operation of the sweat lodge.

It is uncontested that the sweat-lodge ban "substantially burdened" Fowler's "religious exercise" under RLUIPA. Yet MDOC moved for summary judgment on Fowler's RLUIPA claim, contending that the prohibition of the sweat lodge furthered its interest in institutional security, and that prohibiting sweat lodges was the least-restrictive means of furthering this interest. Thus, the only issue before the district court was whether, as a matter of law at summary judgment, MDOC's complete prohibition of sweat lodges satisfied strict scrutiny under RLUIPA.

1. MDOC's Arguments

MDOC admitted it made little to no effort to consider any alternatives to a total prohibition of a sweat lodge. (Crawford Dep. pp. 22-24; Worsham Dep. pp. 15-16; Wood Dep. p. 56) (JA-30, 34, 40). However, relying on affidavits of its officials, it described other Native American practices available to the inmates, including "individual" worship, twice-weekly meetings, and use of various spiritual items such as a pipe, medicine bag, and a dream catcher. MDOC also argued that operation of a sweat lodge raised concerns of sexual misconduct, strong-arming, inmate conspiracy, and inmate possession of tools such as shovels and rocks during the sweat-lodge ceremony, but MDOC acknowledged that these general security concerns exist without a sweat lodge and must be dealt with on a daily basis. MDOC further asserted that a sweat lodge implicates other

concerns, such as the use of fire by inmates, the inability of staff to view the inmates during the sweat, and the personnel time required to oversee such activity.

2. Fowler's Competing Evidence

Fowler opposed MDOC's motion, arguing the ban was the *most* restrictive means of furthering MDOC's alleged security interest. Specifically, Fowler emphasized that MDOC admits that it successfully operated a sweat lodge for 14 years in a maximum-security prison, as do prisons throughout the nation. And the superintendent of the Potosi facility admitted MDOC could continue successfully operating a sweat lodge. (Roper Dep. pp. 47-48)(JA-70). The record also established that many of MDOC's alleged concerns exist in a prison irrespective of whether MDOC operates a sweat lodge; for example, inmates use more dangerous tools in the kitchen (knives) than would be allowed in the sweat-lodge ceremony (antlers and a shovel). (Long Dep. p. 50) (JA-27). The same is true of tools allowed for yard work.

Fowler also presented testimony from Dolores Santha, a "Volunteer in Corrections" for MDOC who served on MDOC's Religious Programming Advisory Council as the Native American representative and has been present at a number of sweat-lodge ceremonies at Potosi. Santha, a Native American "elder," has formal training as an expert in Native American religion, was a police officer for four years, and worked in private security for four years. (Santha Dep. at pp. 9, 13) (JA-54-55). She testified from her experience in MDOC facilities and

elsewhere that the operation of a sweat lodge at Potosi did not pose a security risk because the participants took the ceremony very seriously. (Santha Dep. p. 29) (JA-58).

Fowler also submitted evidence suggesting MDOC failed to consider any alternative to an outright prohibition of sweat lodges. MDOC itself even admits it made little to no effort to consider any alternatives to a total prohibition of a sweat lodge. (Crawford Dep. pp. 22-24; Worsham Dep. pp. 15-16; Wood Dep. p. 56) (JA-30, 34, 40).

3. The District Court's Order

The district court granted MDOC's motion for summary judgment. App. at 43. In relevant part, the district court concluded that Fowler's evidence was identical to that plaintiff had offered in *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996), a case decided under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb-1, *et seq.*, where a divided panel of the Eighth Circuit reversed an injunction requiring MDOC to provide a sweat lodge at Potosi. App. at 37-38. The district court also held Fowler, not MDOC, failed to carry his burden of proof at summary judgment under RLUIPA by not "com[ing] forward with . . . evidence to support his claim that there are less restrictive means of achieving prison safety and security, other than completely prohibiting the sweat lodge ceremony." *Id.*

B. The Court of Appeals' Decision

Fowler appealed to the Eighth Circuit Court of Appeals, arguing in relevant part that the district court improperly construed RLUIPA to place the burden of persuasion on Fowler, improperly applied *Hamilton*—a case decided under RFRA—to Fowler's RLUIPA claim, and erred in holding at summary judgment that MDOC's policy was the least restrictive means of furthering its asserted security interests.

The Eighth Circuit, however, affirmed the district court's holding, likewise finding the *Hamilton* opinion controlling. The court concluded that the standard under RLUIPA was identical to that under RFRA. App. at 16-17. And applying this standard to the "least-restrictive means" component of RLUIPA, the court found that JCCC officials had offered Fowler "alternatives" to the sweat lodge, including an outdoor area to smoke the ceremonial pipe, a medicine wheel, and an outside volunteer to oversee the Native American group. App. at 19.[5] On these facts, the court held "the burden of production shifted to [Fowler] once JCCC officials had come forth with evidence that other means by which Fowler might practice his Native American faith were unacceptable to him." App. at 20 (continuing, "[t]hat Fowler bore the burden of production at this point hardly constitutes an improper shifting of RLUIPA's burden of proof."). The court went on to

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[5] Fowler acknowledged that JCCC made such offers, but argues these activities/programs are not a substitute to the sweat lodge, which is a prerequisite for meaningful religious exercise.

state that while there may be "disputed matters of professional judgment[,]" disputed facts were "altogether absent[.]" App. at 27. Thus, summary judgment was proper.

REASONS FOR GRANTING THE PETITION

The decision below is inconsistent with the text of RLUIPA and the holdings of other courts, and creates a circuit split on an important and recurring issue of federal law: the interpretation and application of RLUIPA's strict-scrutiny standard. As the decision below illustrates, two analytically distinct paths have emerged regarding the interpretation of RLUIPA's strict-scrutiny standard—one consistent with the text of RLUIPA and the strict-scrutiny standard as applied in other contexts, and the other altogether distinct. These different standards require clarification from this Court.

I. RLUIPA'S LEASE-RESTRICTIVE MEANS ANALYSIS IS SUBJECT TO DIVERGENT INTERPRETATIONS AMONG THE CIRCUIT COURTS.

The decision below creates a conflict in the circuits over whether RLUIPA imposes a true strict-scrutiny standard, or whether a lesser standard of review is appropriate. As the decision below illustrates, the Eighth Circuit is of the latter persuasion.[6]

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[6] The Eighth Circuit continued this position in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), where it also applied the holding in *Hamilton*, 74 F.3d 1545, and—according to the

In the decision below, the Eighth Circuit relied on *Hamilton*, a RFRA case in which the court applied a "no greater than necessary" standard, and shifted the burden of proof to the prisoner on the least-restrictive means component. App. at 21-24. By doing so, the Eighth Circuit does not require the government to demonstrate that it considered and rejected less-restrictive alternatives to the challenged policy in order to satisfy RLUIPA's least-restrictive means component. Instead, it holds that the burden of production shifts to the prisoner once the government demonstrates it offered *other means* for religious exercise. Stated differently, the government need not consider and rule out less-restrictive alternatives to *the actual religious exercise being affected* (in this case, a sweat-lodge ban), so long as a federal court is satisfied the inmate has some "other means" to practice his or her faith—irrespective of whether the "other means" is a spiritual substitute to the actual religious exercise affected by the policy at issue, and irrespective of whether accepting the "other means" would force the inmate to violate tenants of his faith. The Eighth Circuit's holding that the governmental policy under review satisfies RLUIPA at summary judgment so long as "other means" exist for the adherent to practice his religion dilutes RLUIPA's text and interpretive provisions to *Turner's* rational-basis formulation. *Turner*, 482 U.S. at 89-90 (balancing whether "alternative means of exercising the [religious] right . . . remain open to prison inmates"). In practical effect, this incorrect reading of RLUIPA

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dissent—failed to apply strict scrutiny as required by RLUIPA. 537 F.3d at 908 (Melloy, J., dissenting).

also transforms the federal appellate courts into divinity counsels of last resort charged with determining what is spiritually sufficient for each diverse faith of inmates throughout the United States.

In contrast to the Eighth Circuit, the First, Third, and Ninth Circuits require the government demonstrate it considered less-restrictive alternatives *to the challenged policy*. *See, e.g.*, *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 41-42 (1st Cir. 2007) ("a prison 'cannot meet its burden of proof of least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice'"); *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005) (same); *Washington v. Klem*, 497 F.3d 272, 283 (3d Cir. 2007)(same, with Hansen, J., of the Eighth Circuit, sitting by designation and joining the Third Circuit's interpretation on this statute). These courts note that "[i]n other strict scrutiny contexts, the Supreme Court has suggested that the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means." *Washington*, 497 F.3d at 284 (citing *Warsoldier*, 418 F.3d at 999; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507, 109 S.Ct. 706 (1989)). And, given the statutory text and legislative history, these circuits hold "this requirement applies with equal force to RLUIPA." *Washington*, 497 F.2d at 284 (continuing, "the phrase 'least restrictive means' is, by definition a relative term. It necessarily implies a comparison with other means."); *see also Warsoldier*, 418 F.3d at 999. These courts, therefore, impose upon the government the burden of making

these comparisons. *See, e.g., Washington*, 497 F.2d at 284. Thus, unlike the Eighth Circuit, the First, Third, and Ninth Circuits require the government to demonstrate it seriously considered alternatives to the policy under review.

These are inconsistent applications of the same statute—the first makes RLUIPA less protective of the right of free exercise than the *Turner* test, a form of rational-basis review, while the second hews close to RLUIPA's text and the precedents of other strict-scrutiny cases. This circuit split will create fractured lines of statutory interpretation until corrected. This Court should, therefore, clarify the proper interpretation of RLUIPA.

II. THE CIRCUIT SPLIT IS DUE, IN PART, TO THIS COURT'S *DICTA* IN *CUTTER V. WILKINSON*, AND CLARIFICATION IS ESSENTIAL TO RESOLUTION OF THE CONFLICT.

This Court has not decided a free exercise claim under RLUIPA. Rather, in *Cutter*, the issue before the Court was: "whether RLUIPA's institutionalized-persons provision, § 3 of the Act, is consistent with the Establishment Clause of the First Amendment." 544 U.S. at 718. In upholding the Act, this Court noted that RLUIPA's strict-scrutiny standard should "be applied in an appropriately balanced way," *id.* at 722, "with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration

of costs and limited resources.'" *Id.* at 723 (quoting Joint Statement S7775).

The lower courts are uniformly unclear as to the amount of deference to accord prison officials. *See, e.g., Spratt*, 482 F.3d at 42, n. 14 ("The level of deference to be accorded to prison administrators under RLUIPA remains an open question.").[7] The First, Third, and Ninth Circuits believe "due deference" does not impact the government's burden under a strict-sscrutiny analysis. Hence, in *Spratt*, the First Circuit held that the Rhode Island Department of Corrections must still demonstrate it considered and rejected less-restrictive alternatives to the preaching ban in question:

> Simply put, RIDOC must 'demonstrate, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest.' This does not conflict with our policy of deferring to the judgment of prison administrators. Rather, before we can evaluate whether deference is due, we must require that prison administrators explain in some detail what their judgment is.

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[7] The First Circuit also noted, "RLUIPA's statutory requirement that we apply strict scrutiny to prison policies that substantially burden religious exercise may be in tension with the legislative history which suggests that courts should continue to defer to the expertise of prison administrators. Obviously, courts will need to find some balance between scrutiny of and deference to prison regulations." *Spratt*, 482 F.3d at 42, n. 14.

Id. at 42 (internal citations omitted). Thus, these courts focus on satisfying the elements of strict-scrutiny as set forth in RLUIPA, and view "due deference" as but one element of their analysis.

In contrast, other jurists focus more on granting "deference" to the government than on requiring it to satisfy the strict-scrutiny standard imposed under RLUIPA. By focusing on "deference," however, these courts and judges, in effect, employ a lesser standard of review than RLUIPA requires. This phenomenon was noted by Judge Melloy of the Eighth Circuit, in his dissenting opinion in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), a RLUIPA case decided subsequent to *Fowler*. Believing his colleagues extended too much deference to prison officials, Judge Melloy countered:

> RLUIPA requires strict scrutiny. While I agree with the majority that 'context matters' in the application of RLUIPA's strict-scrutiny standard and that we must accord 'due deference to the experience and expertise of prison and jail administrators,' in applying RLUIPA, I believe the majority accords [the government's] conclusory justifications a level of deference that is contrary to RLUIPA.

537 F.3d at 908 (Melloy, J., dissenting). Thus, according to Judge Melloy, the *Fegans* majority granted so much deference to the government as to contravene strict scrutiny.

A similar dispute regarding the proper amount of deference exists in the Fourth Circuit. In *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006), the dissent chastised the majority for giving *too little* deference to prison officials, and thereby undermining this Court's instructions in *Cutter* and potentially offending the intent of RLUIPA:

> If *Cutter* conveyed no other message, it signaled to federal courts that RLUIPA must "be applied in an appropriately balanced way." But where the Supreme Court has said, "proceed with caution," the majority has pressed the accelerator. Heedless of the deference due the expertise of prison administrators, heedless of basic principles of statutory interpretations, heedless even of the constitutional dangers of its approach, the majority has placed federal courts at the center of daily prison policymaking. In so doing, the majority may be undermining the very ideal of religious freedom that RLUIPA is meant to protect.

472 F.3d at 217 (Wilkinson, J., dissenting)(internal citations omitted).[8] Thus, judges within the federal circuit courts dispute the amount of deference due—and each side accuses the other of violating the statutory spirit of RLUIPA.

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[8] Further stating: "If the majority's intensifying scrutiny of state prisons affords 'due deference' to prison officials, then those words have lost their meaning." 472 F.3d at 217.

The Eighth Circuit in the decision below likewise used *Cutter* to justify its reliance on *Hamilton*, the RFRA case employing a "no greater than necessary" burden and shifting the "least-restrictive means" burden to the prisoner. App. at 12-13.[9] In *Hamilton*, the Eighth Circuit "reasoned that despite RFRA's 'strict scrutiny' standard, the Act's legislative history plainly revealed that 'context matters[,]'" and, therefore, applied a lesser standard of review. *See* App. at 15 (discussing *Hamilton*). However, although RLUIPA and RFRA are similar, there are significant textual differences. Namely, RFRA lacked any statutory text reinforcing an intent to protect free worship in the prison context. *Cf.* 42 U.S.C. § 2000cc-3(g) with 42 U.S.C. §§ 2000bb-1, *et seq.* (no statutory provision requiring broad construction). *See also*, *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004), *aff'd*, 506 F.3d 1111 (8th Cir. 2007), *cert. denied*, 128 S.Ct. 1493 (2008) ("Because RLUIPA's scope is narrower, with language that applies solely to the prison context, the question remains whether the statute requires us to accord the same deference to the expertise of prison officials as that which we accorded in cases arising under RFRA."). But RLUIPA specifically provides it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [the] Act and the Constitution." 42 U.S.C. § 2000cc-3(g). Thus, under a RLUIPA analysis, the

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[9] Specifically, the Eighth Circuit stated: "[W]e concluded in *Murphy* [] that the RLUIPA standard we would henceforth apply in the prison context was identical to the RFRA standard we had previously applied under RFRA[.]...The following year, the Supreme Court agreed with our view while rejecting an Establishment Clause challenge to RLUIPA." App. at 12-13 (citing *Cutter*, 544 U.S. 709).

focus should be on protecting religious exercise, and the concerns of the institution—although important—should be secondary. Because this Court's statements in *Cutter* have been interpreted in inconsistent ways, and because most circuit courts deciding RLUIPA claims have expressed uncertainty regarding the proper balance of statutory text with legislative and judicial instructions, clarification is necessary. And only this Court can fully resolve this issue.

III. THE DECISION BELOW IS INCORRECT.

The Eighth Circuit's decision below is contrary to the text of RLUIPA and holdings of other federal courts. The only issue before the Eighth Circuit on appeal was whether, as a matter of law at summary judgment, MDOC's complete prohibition of sweat lodges satisfied strict scrutiny—an extraordinary burden since MDOC carried the burden of persuasion at trial. *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008)(reminding under RLUIPA, "When the moving party also bears the burden of persuasion at trial, to prevail on summary judgment it must show that the 'evidence is so powerful that no reasonable jury would be free to disbelieve it.'")(citing 11-56 Moore's Federal Practice-Civil § 56.13). Although the government admitted it did not consider any less-restrictive alternatives to the policy at issue—an absolute ban on sweat lodges at all Missouri state prisons—and although RLUIPA's text clarifies that the burden of persuasion remains with the government to satisfy strict scrutiny, the Eighth Circuit concluded the government satisfied strict scrutiny at summary judgment once "officials had come forth with evidence that *other means by which*

Fowler might practice his Native American faith were unacceptable to him." App. at 20 (emphasis added). This result is incorrect.

A. The Court Below Erred In Shifting The Burden of Proof to the Plaintiff Once the Government Offered Evidence of "Other Means".

In the decision below, the Eighth Circuit held that "the burden of production shifted to [Fowler] once JCCC officials had come forth with evidence that other means by which Fowler might practice his Native American faith were unacceptable to him." App. at 20. Specifically, the court found that, because JCCC offered Fowler alternatives such as an outdoor area to smoke the ceremonial pipe and practice other aspects of his faith, a medicine wheel, or finding an outside volunteer to oversee the Native American group, the burden shifted to Fowler. And "[i]f he was willing to accept something less than a sweat lodge 17 times a year, he should have said so in no uncertain terms." *Id.* Because Fowler failed to use "uncertain terms," summary judgment was proper. *Id.* Such a holding is contrary to the text of RLUIPA and the opinions of other federal courts.

RLUIPA expressly instructs that a plaintiff bears only the burden of showing the challenged practice "substantially burdens" his religious exercise, and "*the government shall bear the burden of persuasion on any [other] element of the claim[.]*" 42 U.S.C. § 2000cc-2(b) (emphasis added). Other federal courts interpreting RLUIPA have consistently placed upon the government the entire burden of proof on the least-restrictive means

prong.[10] Thus, the Eighth Circuit erred in holding that Fowler had the burden of demonstrating less-restrictive alternatives. Rather, it was incumbent on the government to demonstrate that it had considered even one alternative to a *complete ban on sweat lodges*.

B. The Court Below Erred By Not Requiring The Government to Seriously Consider And Reject Less-Restrictive Alternatives to the Sweat-Lodge Ban.

As the Third Circuit noted in *Washington*, "[i]n other strict scrutiny contexts, the Supreme Court has

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[10] *See, e.g.*, *Washington*, 497 F.3d at 284 ("Because this burden is placed on the Government, it must be the party to make this comparison."); *Spratt*, 482 F.3d at 40-41 ("RIDOC still has not shown that the blanket ban...is the 'least restrictive means' available to achieve its interest."); *Warsoldier*, 418 F.3d at 997 ("[U]nder RLUIPA, [the government] is *required* to demonstrate...that it has employed the least restrictive means[.]"); *Lovelace*, 472 F.3d at 189 ("Because Lovelace has demonstrated that he suffered a substantial burden..., the burden shifts to the defendants to show that the [policy] is the least restrictive means[.]"); *Shakur*, 514 F.3d at 889 ("[T]he government bears the burden of establishing that the regulation...is the least restrictive means of achieving that interest."). *Accord Fegans*, 537 F.3d at 911 (Melloy, J., dissenting)("I do not believe it is necessary for Fegans to provide 'data to refute Norris's expert testimony...because under RLUIPA, Fegans does not have the burden of proof."); *Koger v. Bryan*, 523 F.3d 789, 801 (7th Cir. 2008) ("One less restrictive means, [] is sufficient for us to conclude that the prison officials failed to meet their burden that they were employing the least restrictive means of furthering compelling governmental interests.").

suggested that the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means." *Washington*, 497 F.3d at 284. Thus, under the view held by the First, Third, and Ninth Circuits, to meet the "heavy burden" of satisfying the least-restrictive means component of RLUIPA's strict-scrutiny analysis, the government must seriously consider alternatives *to the religious restriction under judicial review*, and explore these alternatives before the district court. *See, e.g., Alvarez v. Hill*, 518 F.3d 1152, 1156 (9th Cir. 2008)(The government "must demonstrate that they actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.")(citations and quotations omitted); *Spratt*, 482 F.3d at 40-41 ("A prison 'cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'").

Here, MDOC outlined what forms of worship it did—or potentially would—allow Native Americans at JCCC, but made no record regarding what less-restrictive alternatives it considered and ruled out beyond an immediate and absolute sweat-lodge ban. And the Eighth Circuit, holding evidence of these "other means" sufficient to satisfy its burden, affirmed summary judgment. However, the "other means" MDOC presented are not alternatives *to the challenged policy*. An outdoor area, medicine wheel, or prayer circle are not substitutes for a sweat lodge. They do not serve the same spiritual purpose. On the contrary, Fowler, under the tenants of his faith, cannot utilize an outdoor area or prayer circle for

religious purposes without first purifying himself in a sweat lodge. Thus, not only were MDOC's offerings false choices, but using them without first purifying in the sweat lodge obligates Fowler to compromise his religion's core principles. As the opinions of other circuits illustrate, such false choices are unacceptable under RLUIPA.

For instance, in *Washington*, the Third Circuit held that the existence of "a palatable alternative" for the inmate to practice his religion had no bearing on whether the government met strict scrutiny as to the policy at issue, instead implying that (if relevant at all) such alternatives related to whether the policy under review "substantially burdened" the particular religious exercise. *Washington*, 497 F.3d at 282. Because, as here, the government in *Washington* did not contest whether the subject policy "substantially burdened" the inmate's religious exercise, the availability of a "palatable alternative" (*i.e.*, other means to practice religion) was irrelevant to the court's strict-scrutiny analysis. *Id.*

Another case, *Greene v. Solano County Jail*, conflicts with the Eighth Circuit's reasoning below as a matter of statutory interpretation. 513 F.3d 982, 989 (9th Cir. 2008). *Greene* addressed whether a prohibition against group worship in a maximum-security prison was permissible under RLUIPA. The government contended that the "religious exercise" subject to strict scrutiny under RLUIPA was, more broadly, Greene's ability to practice Christianity, not just participating in group worship (*i.e.*, Fowler's Native American faith, not the sweat lodge specifically). *Id.* at 987-99. The Ninth Circuit disagreed and held the relevant religious exercise

was group worship, and reversed summary judgment in favor of the defendants. *Id.* That, "alternative means for exercising [plaintiff's] religion remained available to [him]" apart from group worship did not address whether the government satisfied its strict-scrutiny burden to the policy under review. *Id.* at 987. Hence, *Greene's* holding cannot be reconciled with *Fowler*, which shifted the burden of persuasion to Fowler once "officials had come forth with evidence that *other means* by which Fowler might practice his *Native American faith* were unacceptable to him." App. at 20.

The Eighth Circuit erred in not requiring MDOC to present evidence of alternatives to the sweat-lodge ban. This is especially true given that MDOC had a 14-year history of operating a successful sweat lodge in a maximum-security prison.[11] The Eighth Circuit's RLUIPA analysis, turning on what "other means" were offered to Fowler to practice his faith in general, dilutes RLUIPA to the lesser standard of review under *Turner*, 482 U.S. 78. *See Murphy*, 372 F.3d at 983 (affirming summary judgment under *Turner* but reversing under RLUIPA on the exact same issues because, applying *Turner*, there were "sufficient alternative means" for the inmate to practice his

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[11] *See, e.g., Warsoldier*, 418 F.3d at 1000 ("[W]e have found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means. Indeed, the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

faith). *Fowler* now holds, even at summary judgment, that the government satisfies strict scrutiny when "officials . . . come forth with evidence that *other means by which Fowler might practice his Native American faith* were unacceptable to him." App. at 20. The Eighth Circuit's interpretation of this issue is inconsistent with RLUIPA's text and the interpretation of RLUIPA in other federal circuits. This Court should therefore reverse the decision below and clarify the proper interpretation of RLUIPA's strict-scrutiny standard.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 07-2946

CLIFFORD CHARLES FOWLER,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the
	*	United States
Larry Crawford; Steve Long;	*	District Court for
Dave Dormire; Arthur Wood;	*	the Western District
Robert Joe Gibson; Missouri	*	of Missouri.
Department of Corrections,	*	
	*	
Appellees.	*	

Submitted: April 14, 2008
Filed: July 25, 2008

Before GRUENDER, BALDOCK,[1] and BENTON, Circuit Judges.

BALDOCK, Circuit Judge.

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[1] The Honorable Bobby R. Baldock, United States Court of Appeals for the Tenth Circuit, sitting by designation.

This appeal requires us to consider Missouri state prison officials' decision to deny inmate Clifford Fowler a sweat lodge in which to practice his Native American faith. Fowler claims prison officials' refusal to grant him such access violates § 3(a) of The Religious Land Use and Institutionalized Persons Act (RLUIPA). See Pub. L. No. 106-274, § 3(a), 114 Stat. 804 (2000) (codified at 42 U.S.C. §§ 2000cc-1). Subsection 3(a) of RLUIPA provides in relevant part:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–
>
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.

In a thorough opinion, the district court granted summary judgment to prison officials. See Fowler v. Crawford, No. 05-4212-CV-C-NKL, 2007 WL 2137803 (W.D. Mo. July 23, 2007) (unpublished).[2] The court concluded it was bound by our decision in Hamilton v. Schiro, 74 F.3d 1545 (8th Cir. 1996), and held prison officials' "denial of a

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[2] The Honorable Nanette K. Laughery, United States District Court for the Western District of Missouri.

sweat lodge to [Fowler] is in furtherance of a compelling governmental interest in safety and security in maximum security prisons and is currently the least restrictive means to ensure such safety and security." Fowler, 2007 WL 2137803, at *8. Our jurisdiction arises under 28 U.S.C. § 1291. On appeal we apply the same summary judgment standard as the district court, viewing the evidence in a light most favorable to Fowler and giving him the benefit of all reasonable inferences to be drawn therefrom. See Buboltz v. Residential Advantages, Inc., 523 F.3d 864, 867-68 (8th Cir. 2008). Applying this standard, we affirm.

Fowler, of Cherokee descent, is an inmate at the Jefferson City Correctional Center (JCCC). Fowler is serving a life sentence without the possibility of parole for second-degree murder. See Fowler, 2007 WL 2137803, at *2. JCCC is a maximum security prison operated by the Missouri Department of Corrections (MDOC). JCCC houses nearly 2000 adult male inmates. The inmates have been convicted of committing serious felonies, or acts of violence while incarcerated. Over 200 of JCCC's inmates are serving life without parole. The average sentence at JCCC is twenty to thirty years imprisonment. See Joint Appendix at 76 (hereinafter JA).

Presently, JCCC permits Fowler and other inmates who practice the Native American faith to hold a two hour meeting twice weekly in the prison chapel. As part of their meetings, JCCC permits the group, comprised of roughly six inmates, to possess a "sacred bundle." The sacred bundle consists of a

prayer pipe, sage, cedar, sweetgrass, tobacco, a medicine bag, and prayer feathers. See JA at 43.

Because of Native Americans' affinity with the Earth, Fowler has requested access to an outdoor area in which to facilitate his group's bi-weekly meetings. See JA at 44. Prison officials are willing to accommodate Fowler's request. Both JCCC's Superintendent and Associate Superintendent, Defendants Dave Dormire and Arthur Wood respectively, are "currently" and "actively" working with JCCC's Chaplain, Defendant Robert Gibson, to secure an outdoor meeting area for JCCC's Native American group. See JA at 74, 78, 84. Fowler claims, however, that an outdoor meeting area is not enough. Specifically, Fowler demands within such area access to a sweat lodge a *minimum* of 17 times a year: "I want the sweat lodge a minimum –basically a minimum of 17 times a year, that's once a month. And then once for each solstice and equinox, and once for a yearly celebration." JA at 44.

When asked about the use of an outdoor area in which to practice his Native American faith, Fowler insisted a sweat lodge was essential to practicing his faith:

> Q. You mentioned in your complaint that you also wanted an outdoor area, at least, to practice your Native American beliefs in. If you didn't get a sweat lodge as part of that outdoor area, would you still be able to practice your religion in the outdoor area?

A. I wouldn't be able to – to pray to the Great Spirit.

Q. Okay. Would that be better than your current chapel area to practice your beliefs, an outdoor area?

A. Are you asking if I had an outdoor area, would that be better than nothing at all? Is that basically –

Q. Better than what you currently have?

A. I'm sure that it would be somewhat better, but it still wouldn't enable me to pray for the Great Spirit.

Q. You need the sweat lodge in order to do that?

A. Yes. I need to be able to purify in the sweat lodge in order to properly use the sacred pipes to pray for the Great Spirit.

JA at 48-49. Fowler acknowledges that JCCC prison officials "are working to create an outdoor area for Native American group religious practice during regularly scheduled meetings," but "[s]uch an area is not a substitute for the sweat lodge, which [Fowler's] beliefs require." Supplemental Joint Appendix at 253 (hereinafter SJA).[3] To fully appreciate the nature of

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[3] Absent a sweat lodge, Fowler also rejects the idea of a medicine wheel (also referred to in the record as a "prayer circle") in the outdoor area:

Fowler's request, a detailed description of a sweat lodge and the security concerns it engenders in an institutional setting is necessary.

Willow poles form the structure of a sweat lodge. Participants place several poles, 1½ inches in diameter and 14-16 feet long into the ground and bend them to create a domed structure held together by a small cord.[4] The size of the completed lodge is approximately 4 feet high and 8-10 feet wide, accommodating 12-15 individuals. Blankets or tarps cover the entire structure to contain heat and dark. In the center of the lodge, a depression approximately 3 feet wide and 2 feet deep is designed to hold several cantaloupe-sized rocks. The dirt from the depression is placed outside the entrance of the lodge to form an altar mound. See JA at 44-48; SJA at 128-29.

Directly beyond the altar mound is a fire pit. The pit rests 12-15 feet outside the lodge's entrance and measures approximately 5-6 feet by 4 feet.

> A medicine wheel is a sacred thing, constructed upon ground considered/designated as being sacred. It is a large altar, and anyone who enters into or near it must be ritually purified through the sweat lodge ceremony. To construct a medicine wheel in an area designated for Native American religious practice, while denying use of a sweat lodge, would be to desecrate one ceremony for lack of the other. Something which I will not do.

SJA at 531.

[4] A sweat lodge takes 4-5 hours to construct. According to Fowler, JCCC's Native American group would construct the sweat lodge using two shovels, two post hole diggers, one pick, and one handsaw. The structure is designed to last four years. See JA at 45; SJA at 133. A detailed description of the construction process appears at pages 132-33 of the SJA.

Firewood is stacked in the pit. The rocks are placed on the firewood and the wood is lit. Once the rocks are hot, a participant carries 7-10 rocks, depending on their size, to the lodge entrance with a shovel or pitchfork. The ceremony's facilitator receives the hot rocks using a pair of deer antlers and places them in the depression at the center of the lodge. See JA at 45-48; SJA at 128-29, 133.

A sweat lodge typically consists of four rounds. Participants enter the lodge wearing only shorts, or a towel wrapped around their waist. A round begins when the hot rocks are placed in the depression and the doorway flap is closed. The facilitator intermittently pours water containing sage, cedar, and/or sweetgrass over the rocks to produce steam, heat and humidity. During each round, the participants engage in a prescribed set of songs and prayers. Participants may smoke the ceremonial pipe during the round. See JA at 45-48; SJA at 128-29.

A round takes from 30 minutes to an hour to complete. Upon completion of a round, the doorway flap is raised and additional hot rocks and water are brought into the lodge. A new round then begins. The typical number of rocks used during the ceremony is 30-40. The entire ceremony typically takes 6-7 hours to complete. To conclude the ceremony, participants exit the lodge and remove the blankets or tarps from the willow pole structure. The fire is burned down and sacred objects are stored for safekeeping. The lodge's skeletal structure remains standing. See JA at 44-48; SJA at 128-29.

JCCC prison officials do not question the sincerity of Fowler's request for a sweat lodge. Nor do

they challenge the proposition that their decision to deny Fowler a sweat lodge substantially burdens the exercise of his religious faith. See Fowler, 2007 WL 2137803, at *3. Numerous officials, however, have offered a myriad of reasons why they believe Fowler's request for a sweat lodge compromises security at JCCC to an unacceptable degree.

Defendant Wood, JCCC's Associate Superintendent, submitted an affidavit attesting that incidents of violence have occurred at JCCC "during call-out times for religious services." JA at 77. Wood stated that religious groups, like the Native American group at JCCC, "who do not have regular volunteers" from outside the prison to oversee their ceremonies, pose a particular risk because meeting times may be used for inappropriate purposes:[5] "Offenders, for instance, have used religious programming time to engage in sexual misconduct and organize violence." JA at 77; see also SJA at 595-98 (discussing specific instances of violence and

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[5] The 2003 version of MDOC's Institutional Services Policy and Procedural Manual defines a Volunteer as "[a] person who performs assigned duties in the department without monetary or material compensation from the department, following the prescribed application, interview, training and site orientation process." SJA at 153. JCCC's Chaplain, Defendant Gibson, has been unable to locate a volunteer familiar with the Native American faith to oversee the Native American group meetings at JCCC. Defendant Gibson has contacted both Gayl Edmunds of the Heart of America Indian Center in Kansas City, and Dolores Santha, a former volunteer for the Native American group at MDOC's Potosi Correctional Center. Neither Edmunds nor Santha was able to provide Defendant Gibson with any information regarding possible Native American volunteers in the Jefferson City area. See SJA at 371.

sexual misconduct during religious services at JCCC's predecessor institution).

In addressing Fowler's request for a sweat lodge, Defendant Wood explained: "The sweat lodge ceremony, in which offenders gather in an enclosed area screened from the view of those outside the lodge, and during which offenders tend a fire, handle firewood and large hot rocks, create hot steam, and use tools, including shovels, poses a significant security risk." JA at 77. Wood cited the risk of sexual misconduct, physical assault, and drug use, as well as fire and heat-related safety concerns.[6] Wood also explained that the sweat lodge would "consume considerable institutional financial and personnel resources" and "expend many institutional personnel hours." JA at 78. Finally, Wood indicated that extending unique privileges such as a sweat lodge to one group of inmates to the exclusion of others creates a risk of resentment among the inmate population leading to the potential for unrest and disturbance. See JA at 77-78.

Fellow MDOC officials reiterated Defendant Wood's concerns about operating a sweat lodge at JCCC. Defendant Steve Long, Director of Rehabilitative Services, described his concern over the objects used during a sweat lodge, namely rocks, willow poles, shovels, deer antlers, and split wood, all of which could be used as weapons: "We just try not

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[6] Indeed, in their proposal to JCCC for a sweat lodge, the Native American group indicated that "[d]ue to extreme heat and humidity associated with the sweat lodge ceremony, participating . . . inmate offenders will sign a statement releasing [MDOC] from any and all liability prior to participation." SJA at 129.

to issue things like that to the [inmate] population if we don't have to." JA at 27. Defendant Long described a sweat lodge as fraught with risk. See SJA at 461-63.

Notably, MDOC's Potosi Correctional Center (PCC) at one time authorized a by-yearly sweat lodge ceremony only to discontinue it later. PCC is a maximum security prison half the size of JCCC. Donald Roper, PCC's Superintendent, stated that PCC discontinued operating the sweat lodge in 2006 due to increasing security concerns amidst a guard stabbing at the prison. See JA at 51. At his deposition, Roper expressed ongoing concerns over staffing issues, budget cuts, inmate screening, and the security challenges posed by the sweat lodges' dark confines. See JA at 68-72. Terry Moore, MDOC Director of the Division of Adult Institutions, likewise expressed his discomfort with a sweat lodge. When asked about the possibility of installing a security camera inside the lodge to monitor the participants' conduct, Moore explained the interior of the lodge was dark and, in any event, the steam from the rocks would fog a security camera's lens. See SJA at 458. When asked about the feasibility of once again accommodating a sweat lodge at PCC, Roper responded that if court-ordered, he would do so:

> I'm sure that we could make adjustments and probably accommodate a sweat lodge. Is it a good situation? Absolutely not. Is there security concerns? Absolutely. Would my chief of custody, my major, would he have a runaway [i.e., be upset]? Yes, he would. He would write me memos and point out to me all the safety and security

> concerns that he continuously had when the sweat lodge existed. And . . . now that it doesn't exist, he would say the same thing, that there is a tremendous amount of security concerns that evolved around the sweat lodge.

JA at 70. Roper emphasized: "I'm telling you, I'm here, I've been here, I've done this, and it has the potential to be a problem." JA at 71

Even Defendant Gibson, JCCC's Chaplain, expressed serious concerns about accommodating a sweat lodge. Gibson worried about what might occur inside the lodge and outside the view of prison security. He cited the physical well-being of the participants, as well as the possibility of sexual improprieties and drug use: "[T]here's no way to know what goes on in there." SJA at 479. Gibson supported the idea of an outdoor area where members of JCCC's Native American group would be permitted "to smudge, to smoke pipe and [do] those kinds of things . . . central to all tribes."[7] "That's what I support, because it's viewable, you can monitor it from any number of locations and I'm not as concerned with any kind of inappropriate activity ..." SJA at 480.

II.

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[7] Smudging involves the burning of plants considered sacred, such as sage, cedar, sweet grass, and tobacco or a tobacco blend called kinni-kinnick. Prior to a Native American religious ceremony, the smoke from these burning plants is waved, using a feather, over the participants, the sacred items to be used, and the area in which the ceremony will be performed. See SJA at 122.

As we noted at the outset, Fowler asserts JCCC officials' refusal to accommodate his request for a sweat lodge 17 times a year violates § 3(a) of RLUIPA. See 42 U.S.C. § 2000cc-1(a). RLUIPA is a direct congressional response to the Supreme Court's decision in City of Boerne v. Flores, 521 U.S. 507 (1997). The Court in that case held RLUIPA's predecessor, The Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb - 2000bb-4), unconstitutional as applied to the States because it exceeded Congress' Fourteenth Amendment remedial powers. See City of Boerne, 521 U.S. at 529-36. Section 3 of RFRA broadly provided the Government could substantially burden a person's exercise of religion only upon demonstrating that application of the burden furthered a compelling governmental interest and was the least restrictive means of furthering that interest. See 42 U.S.C. § 2000bb-1 (invalidated by City of Boerne).

Because RLUIPA essentially resurrected RFRA's language (while invoking congressional authority under the Spending and Commerce Clauses), we concluded in Murphy v. Missouri Dep't Corr., 372 F.3d 979, 987 (8th Cir. 2004) that the RLUIPA standard we would henceforth apply in the prison context was identical to the RFRA standard we had previously applied under RFRA:

> Although the legislative history is brief, several factors cause us to conclude that Congress intended that the language of [RLUIPA] is to be applied just as it was under RFRA. Congress did not intend to

> overly burden prison operations, but rather intended to provide as much protection as possible to prisoners' religious rights without undermining the security, discipline, and order of those institutions.

The following year, the Supreme Court agreed with our view while rejecting an Establishment Clause challenge to RLUIPA. In Cutter v. Wilkinson, 544 U.S. 709 (2005), the Court recognized that "[t]o secure redress for inmates who encountered undue barriers to their religious observations, Congress [in RLUIPA] carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard." Id. at 717. The Court repeatedly pointed out, however, that lower courts in applying that standard must remain mindful of context: "Lawmakers anticipated. . . that courts entertaining complaints under § 3 would accord 'due deference to the experience and expertise of prison and jail administrators.' " Id. The Court cautioned against construing RLUIPA to elevate accommodation of religious practice over an institution's need to maintain order and safety:

> We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling governmental interest" standard, . . . "[c]ontext matters" in the application of that standard. See Grutter v Bollinger, 539 U.S. 306, 327 (2003). Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and

> security in penal institutions. See, e.g., 139 Cong. Rec. 26190 (1993) (remarks of Sen. Hatch). They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." Joint Statement 16699 (quoting S. Rep. No. 103-111, at 10) [Joint Statement of Sen. Hatch and Sen. Kennedy on RLUIPA appearing at 146 Cong. Rec. 16698, 16699 (2000)].

Cutter, 544 U.S. at 722-23 (internal footnotes omitted). Lest doubt remain, the Court repeated its message a final time: "It bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area." Id. at 725 n.13.

That brings us to our decision in Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996), which, although decided under RFRA, is markedly similar to the case now before us. Indeed, the district court opined that "no reasonable judge could distinguish this case from Hamilton." Fowler, 2007 WL 2137803, at *8. In Hamilton, prison officials appealed from a grant of injunctive relief to an inmate. We held that RFRA did not mandate inmate access to a sweat lodge at PCC, and reversed the district court:

> [T]he lower court got off on the wrong foot by not giving appropriate deference to the

> decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement. . . . [J]udgments regarding prison security are peculiarly within the province and professional expertise of corrections officials, and in absence of *substantial* evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

Hamilton, 74 F.3d at 1553 (internal quotations omitted).[8] We reasoned that despite RFRA's "strict scrutiny" standard, the Act's legislative history plainly revealed that "context matters:" "[A] court applying RFRA must give due deference to the expertise of prison officials in establishing regulations to maintain prison safety and security, even when the court applies a heightened standard of review." Id. at 1554.

The concerns surrounding a sweat lodge that prison officials expressed in Hamilton are identical to those JCCC officials expressed in this case. See id. at 1548-49. Like here, prison officials in Hamilton appeared amenable to inmates of the Native American faith meeting outdoors in plain view of security to pray and conduct ceremonies. See id. at

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[8] Although the panel split 2-1 in Hamilton, the dissent did not challenge the underlying analysis of Hamilton's sweat lodge claim. Rather, the dissent took issue with the constitutionality of RFRA. See Hamilton, 74 F.3d at 1557 (McMillian, J., dissenting) (arguing Congress lacked the power under § 5 of the Fourteenth Amendment to enact RFRA).

1556. Much like Fowler asserts in this case, however, Hamilton asserted that "if he could not have access to a sweat lodge ceremony, he would not and could not practice any aspect of his religion." Id. at 1548. Given Hamilton's position, we concluded that his case presented us with –

> the unusual situation where the government has satisfied the least restrictive means prong by demonstrating that other less restrictive alternatives are not acceptable to plaintiff. . . . Hamilton's own all-or-nothing position supports the prison officials' contention that an out-right prohibition against a sweat lodge ceremony is the least restrictive means of achieving the compelling interests of prison safety and security in this case.

Id. at 1556.

III.

Like the district court, we are hard pressed to distinguish Hamilton from this case. By all appearances, Hamilton dictates the outcome here. See South Dakota v. United States Dep't Interior, 487 F.3d 548, 551 (8th Cir. 2007) (recognizing the established rule that a subsequent panel may not overrule a prior panel's decision). As we have seen, that we decided Hamilton under RFRA and Fowler's case arises under RLUIPA is inconsequential. Left with little alternative, Fowler suggests time has been Hamilton's undoing because subsequent to our decision, PCC officials operated a sweat lodge for over a decade without major incident. Seeking to

capitalize on PCC officials' exercise of discretion, Fowler first insists that the concerns prison officials raised about operating a sweat lodge at JCCC are not compelling, but rather exaggerated. Fowler then argues that, given PCC's past history, JCCC officials cannot possibly prove an outright ban on a sweat lodge is the least restrictive means of furthering the prison's interest in security.

A.

A prison's interest in order and security is always compelling. See, e.g., Cutter, 544 U.S. 725 n.13; see also Murphy, 372 F.3d at 988 (acknowledging that "MDOC has a compelling interest in institutional security"). Certainly, to ensure prison policies are in furtherance of that compelling interest, officials' security concerns must be "grounded on more than mere speculation, exaggerated fears, or post-hoc rationalizations." S. Rep. No. 103-111, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900 (Senate Report on RFRA). But no reasonable jurist, affording due deference to prison officials, can dispute that serious safety and security concerns arise when inmates at a maximum security prison are provided ready access to (1) burning embers and hot coals, (2) blunt instruments such as split wood and large scalding rocks, (3) sharper objects such as shovels and deer antlers, and (4) an enclosed area inaccessible to outside view. As PCC Superintendent Roper aptly explained: "I'm telling you, I'm here, I've been here, I've done this, and [a sweat lodge] has the potential to be a problem." JA at 71. See Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006) (providing due deference to prison policy restrictions "that take[] into account

any institutional need to maintain good order, security, and discipline or to control costs"); see also Coronel v. Paul, 225 F. App'x 575, 577 (9th Cir. 2007) (unpublished) (citing Hawaii prison officials' decision to discontinue sweat lodge ceremonies "because an investigation revealed that Hawaiian prison gangs were using these services as a forum to organize disruption" at the prison).

And this is to say nothing of a sweat lodge's drain on prison security's manpower over the 6-7 hour duration of the ceremony. Such a drain becomes all too real if unrest arises in one part of the prison while a sweat lodge ceremony is ongoing elsewhere. See Al-Alamin v. Gramley, 926 F.2d 680, 686 (7th Cir. 1991) ("Prison administrators . . . have limited resources to provide the services they are called upon to administer."). Prison officials need not endure assaults, drug indulgence, or sexual improprieties before implementing policies designed to prevent such activities in an uneasy atmosphere. Nor do prison officials charged with managing such a volatile environment need present evidence of actual problems to justify security concerns. See Murphy, 372 F.3d at 989. The record before us well documents JCCC officials' legitimate fears surrounding a sweat lodge. On this record, we have no difficulty concluding JCCC officials met their burden under § 3(a)(1) of RLUIPA and established, as a matter of law, that prohibiting a sweat lodge at JCCC is in furtherance of a compelling governmental interest. See 42 U.S.C. § 2000cc-1(a)(1).

B.

Fowler takes more forceful aim at § 3(a)(2) of RLUIPA, the least restrictive means component. See 42 U.S.C. § 2000cc-1(a)(2). He initially asserts the district court improperly placed the burden on him to establish a sweat lodge ban was not the least restrictive means by which to alleviate officials' security concerns. See id. § 2000cc-2(b) (placing the burden on the Government to establish a compelling governmental interest served by the least restrictive means). Fowler's argument is unavailing. The record before us plainly reveals that JCCC officials suggested alternatives to and sought a compromise with Fowler, to no avail. They offered Fowler an outdoor area where he may smoke the ceremonial pipe and practice other aspects of his Native American faith in open view. See JA at 74, 78, 84. Officials suggested a medicine wheel. See SJA at 531. They sought to locate an outside volunteer to oversee JCCC's Native American group. See SJA at 371.[9] See Spratt v. Rhode Island Dep't Corr., 482 F.3d 33, 41 n.11 (1st Cir. 2007) (suggesting that "to meet the least restrictive means test, prison administrators generally ought to explore at least some alternatives"). Nonetheless, Fowler has rejected anything short of a sweat lodge a *minimum* of 17 times a year, insisting JCCC utilize whatever

[9] At the time PCC permitted a sweat lodge, MDOC guidelines on Native American Spirituality provided that "[s]weat lodges *may* be constructed at correctional centers." JA at 173 (emphasis added). Sweat lodge ceremonies, however, "are to be allowed *only* when there is approved external spiritual leadership to lead practices and *only* when all operational considerations are addressed to the satisfaction of the Superintendent." SJA at 173 (emphasis added). Current MDOC policies do not provide for the operation or construction of a sweat lodge at any MDOC institution. See SJA at 378.

resources and screening procedures are necessary to meet his demand. See JA at 44; see also Aplt's Reply Br. at 2 n.1 (stating Fowler would accept additional guard supervision, including a guard inside the lodge).

Fowler also belatedly asserts that his request for a transfer to PCC, at a time when that prison was accommodating a sweat lodge twice yearly with numerous staff-imposed restrictions, illustrates his willingness to accept something less than what he ostensibly demands. But apart from Fowler's transfer request, we can find nothing in the record to suggest that Fowler had any actual knowledge of the restrictions PCC placed on the sweat lodge ceremony, including its frequency. Besides, Fowler surely knows more about the practice of his Native American faith than JCCC officials. If he was willing to accept something less than a sweat lodge 17 times a year, he should have said so in no uncertain terms. Instead, he said exactly the opposite: "I want the sweat lodge a minimum – basically a minimum of 17 times a year . . . ." JA at 44.

Unfortunately for Fowler, the burden of production shifted to him once JCCC officials had come forth with evidence that other means by which Fowler might practice his Native American faith were unacceptable to him. Where a motion for summary judgment is properly made and supported, as JCCC officials did here consistent with their burden of proof, an opposing party must set forth specific facts showing a genuine issue for trial. See Fed. R. Civ. P. 56(e)(2). That Fowler bore the burden of production at this point hardly constitutes an improper shifting of RLUIPA's burden of proof. "It

would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA." Hamilton, 74 F.3d at 1556; accord Spratt, 482 F.3d at 41 n.11 (applying RLUIPA).

Fowler's reliance on our decision in Murphy to suggest the district court improperly shifted RLUIPA's burden of proof to him is misplaced. In Murphy, we held prison officials could not meet their burden of establishing that the denial of group worship privileges to Murphy, a white supremacist, was the least restrictive means of furthering their interest in security, where the only evidence officials presented was that Murphy was a racist and his religion limited participation to Anglo-Saxons. Unlike this case, we explained that "[i]t is not clear [whether] MDOC seriously considered any other alternatives, nor were any explored before the district court." Murphy, 372 F.3d at 989.

Of course, our own Justice Blackmun recognized that "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike [regulation] down." Illinois State Bd. Elec. v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring) (criticizing the least restrictive means test as a "slippery slope" of uncertainty). But such a draconian construction of RLUIPA's least restrictive means test would render federal judges "the primary arbiters of what constitutes the best solution to every religious accommodation problem" in state penal institutions. Lovelace, 472 F.3d at 215 (Wilkinson, J.,

dissenting).[10] And, as we have seen, this would be inconsistent with congressional intent. See Cutter, 544 U.S. at 722-23.

We must remain mindful that Cutter counsels restraint in this realm. There, the Supreme Court repeatedly instructed us to provide "due deference to the experience and expertise of prison and jail administrators" in construing RLUIPA. Id. at 723. Otherwise, "religious accommodation in the penological context threatens to become the tail that wags the dog. Absent due restraint, 'inmate requests for religious accommodations [may] become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution.' " Lovelace, 472 F.3d at 217 (Wilkinson, J., dissenting) (quoting Cutter, 544 U.S. at 726).

Undeterred, Fowler insists that JCCC officials have not established that an outright sweat lodge ban is the least restrictive means of ensuring prison safety and security. Again, Fowler cites PCC's previous operation of a sweat lodge essentially to conclude "they did it at PCC, they can do it at JCCC." Given the obvious security concerns surrounding the sweat lodge itself, we are loathe to suggest that had

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[10] Nor is this a view of federalism we wish to endorse. We cannot "imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with states laws, regulations, and procedures, than the administration of its prisons." Woodford v. Ngo, 548 U.S. 81, 94 (2006); see also Hamilton, 73 F.3d at 1553 ("[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." (internal quotations omitted)).

Fowler shown some willingness to soften his demand the outcome of this case might differ. Courts have repeatedly recognized that "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution." Spratt, 482 F.3d at 42. In Hamilton, we acknowledged deposition testimony from prison administrators in other states that their respective institutions conducted sweat lodge ceremonies without major problems. Hamilton, 74 F.3d at 1548. Yet that was not enough for us to strip PCC officials of their discretion in deciding whether to accommodate inmates of the Native American faith with a sweat lodge.[11]

Of course, this is not to say that evidence of what other prisons have done to accommodate inmates' religious practices is irrelevant to our inquiry. See Washington v. Klem, 497 F.3d 272, 285

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[11] Similarly, the Sixth Circuit in Hoevenaar v. Lazaroff, 422 F.3d 366 (6th Cir. 2005) rejected an inmate's demand to wear a kouplock as part of his religious faith despite evidence that earlier prison regulations had permitted individualized exceptions to hair style without incident:

> Although the district court noted that the prison did not produce data demonstrating that the pre-1991 use of discretionary exceptions to prison regulations resulted in more dangerous prisons, the testimony of [Major] Guyton and Warden Lazaroff was sufficient to demonstrate that individualized exceptions did not sufficiently protect the state's interest in security and safety, particularly in light of the deference accorded to the judgment of prison officials regarding prison operations. Hoevanaar did not rebut the state's expert testimony regarding the problems with his suggested alternatives "by substantial evidence" that the officials exaggerated their response to security considerations.

Id. at 371-72.

(3d Cir. 2007). But as prisons differ, so may the means by which prison officials ensure order and stability:

> Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their *own* institutions than outside observers.

Hamilton, 74 F.3d at 1557 n.15 (emphasis added). The point is that prison officials may, quite reasonably, exercise their discretion differently based upon different institutional circumstances.[12] RLUIPA "mandates a uniform test, not a uniform result." Hamilton, 74 F.3d at 1554 (internal quotations omitted).

A holding that RLUIPA requires JCCC to provide Fowler a sweat lodge simply because PCC

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[12] For instance, JCCC's inmate population is over twice the size of PCC's inmate population. Compare JA at 76 (estimating JCCC's inmate population at 1,973) with SJA at 560 (estimating PCC's inmate population at 980). This alone suggests that officials at JCCC may well be unable to accommodate religious practices that PCC may accommodate. Another material difference is that PCC, while operating the sweat lodge, apparently had outside volunteers to oversee its Native American group and maintain the group's focus. JCCC in contrast has been unable to locate such volunteers. Compare JA at 56-57 (deposition of former PCC Volunteer Dolores Santha) with SJA at 371 (affidavit of JCCC Chaplain Robert Gibson).

operated a sweat lodge for a number of years without incident would adversely impact MDOC inmates. In effect, such a result would require every penal institution within MDOC's jurisdiction to accommodate inmates of the Native American faith with a sweat lodge because those institutions' security interests are surely no greater than those of JCCC, the highest level maximum security prison within MDOC. This would discourage prison officials within MDOC from accommodating inmates' religious practices, knowing that if one institution accommodated a particular religious practice, then all institutions would likely have to accommodate the same practice, regardless of the facts and circumstances. For all the foregoing reasons, we conclude JCCC officials met their burden under § 3(a)(2) of RLUIPA and established, as a matter of law, that prohibiting a sweat lodge at JCCC is the least restrictive means by which to further the institution's compelling interest in safety and security. See 42 U.S.C. § 2000cc-1(a)(2).

IV.

In enacting § 3 of RLUIPA, Congress sought to eliminate "frivolous or arbitrary" barriers impeding prisoners' exercise of religion. See Cutter, 544 U.S. at 716. One need not be analytically inclined to discern the difference between the arbitrary restrictions Congress sought to proscribe with RLUIPA, and JCCC's sweat lodge ban.[13] Providing inmates at a

[13] For example, congressional hearings revealed some Muslim prisoners complained about the lack of Hallal food that was a necessary part of their religious observance, other Jewish prisoners complained about a lack of sack lunches that would enable them to break their religious fasts after nightfall, still

maximum security prison access to burning fires, red hot rocks, split wood, shovels, and deer antlers alone generate a unique and obvious set of security concerns. Add to this an enclosed area engulfed in steam and void of light, outside the view of prison guards, and prison officials' fears are further legitimized. And we must not forget that the sweat lodge ceremony would expend significant prison resources, undoubtedly diverting limited resources from other areas of the prison. Considering all these factors, we find nothing "frivolous or arbitrary" about JCCC's refusal to accommodate Fowler's request for a sweat lodge.

Recall that in Hamilton, we did "not . . . foreclose the possibility of a successful sweat lodge claim *under different circumstances.*" Hamilton, 74 F.3d at 1557 (emphasis added). Indeed, where possible, "we encourage[d] prisons to accommodate the religious needs of inmates, including American Indian inmates." Id. And that is precisely what

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others complained about a ban on lighting Chanukah candles although the prison permitted smoking and votive candles. A clergyman described a year long battle over the use of Sacramental Wine. The same witness explained that some prison officials treated with contempt inmate possessions such as the Bible, the Koran, the Talmud, and Native American sacred objects. Officials reportedly on occasion confiscated, damaged, or discarded these possessions. See Cutter, 544 U.S. at 717 n.5. Case law reveals other seemingly unnecessary restrictions on inmates' religious practices. For instance one inmate, an ordained minister, was not permitted to preach at weekly religious services. See Spratt, 482 F.3d at 35. Another inmate complained that prison officials unduly limited the number of religious books he could possess in his cell, although prison policies allowed him personal property in the amount of four storage boxes. See Washington, 497 F.3d at 285.

officials at PCC subsequently did, operating a bi-yearly sweat lodge for Native American inmates until, due to prison unrest, they determined in their discretion that the balance between religious accommodation and prison security tipped in favor of the latter. Similarly, JCCC officials have exercised their discretion and determined that a sweat lodge at JCCC jeopardizes prison safety and security to an unacceptable degree. This is precisely the exercise of discretion to which RLUIPA requires us to defer.

Stripped of rhetoric, the question before us is not whether JCCC officials *may*, but whether they *must*, provide Fowler with a sweat lodge. In other words, the pertinent query is whether a federal appeals court, far removed from the realities of institutional life at JCCC, or state prison officials – well familiar with (1) the size and nature of JCCC's population, (2) the staffing problems and budgetary restrictions under which they labor, and (3) the various religious practices they are asked to accommodate – is best suited to make such a decision. The answer is clear when we distinguish between disputed facts (which are altogether absent here) and disputed matters of professional judgment. When we are presented only with disputes regarding professional judgment, "our inferences must accord deference to the views of prison authorities" where those views rest on more than mere speculation and conjecture. Beard v. Banks, 126 S. Ct. 2572, 2578 (2006) (plurality).

The judgment of the district court is **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

CLIFFORD CHARLES FOWLER, Register No. 166478,	)	
Plaintiff,	)	
v.	)	No. 05-4212-CV-C-NKL
LARRY CRAWFORD, et al.,	)	
Defendants.	)	

ORDER

Before this Court are the motions of plaintiff Clifford Fowler and defendants Larry Crawford, Steve Long, Dave Dormire, Arthur Wood, Joe Gibson, and the Missouri Department of Corrections seeking summary judgment. Responses and reply suggestions to the motions have been filed by both plaintiff and defendants.

Motion to Strike

In response to plaintiff's reply suggestions and exhibits in support of summary judgment, defendants have filed a motion to strike plaintiff's Exhibits 1 through 4. Defendants argue that such exhibits were not properly disclosed to defendants prior to their filing and that the exhibits do not satisfy the requirements of Rule 56, Federal Rules of

Civil Procedure. Plaintiff has filed suggestions in opposition, stating Exhibits 1 through 4, which reflect the policies of the Federal Bureau of Prisons and other state prison systems on sweat lodges, are freely available to the public on the Federal Prison Bureau website and various state equivalents. Plaintiff argues that such exhibits were not under his possession, custody or control; rather, they were equally available to all parties had defendants opted to conduct basic investigative work in this case. Plaintiff further argues that the exhibits are of the nature that the court can take judicial notice under Rule 201, Federal Rules of Evidence.

The court may take judicial notice at any stage in the proceedings regarding facts that are not reasonably subject to dispute or are generally known or capable of accurate and ready determination. Fed. R. Evid. 201. The exhibits submitted by plaintiff in his reply suggestions in support of summary judgment are of such a nature that they are susceptible to judicial notice. The information provided by the exhibits is from federal and state prisons; therefore, it is capable of accurate and ready determination, if necessary, and is not reasonably subject to dispute. Further, although not disclosed prior to the summary judgment stage in the proceedings, this court finds no prejudice to defendants. Plaintiff has complied with discovery and disclosure in this case. Defendants have been on notice that the claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) involve the least restrictive means test which involves a determination as to whether there are alternatives available to accommodate plaintiff's request for use of a sweat lodge, to which, arguably, accommodations

made by other prisons could be relevant. In plaintiff's motion for summary judgment, he specifically argues that federal prisons and other state prisons allow sweat lodges; thus, although supporting exhibits were not attached, defendants were clearly put on notice and, in fact, responded in opposition to such argument, stating that accommodation at other institutions is not relevant to accommodation at Jefferson City Correctional Center (JCCC). Additionally, the exhibits submitted by plaintiff were obtained from state or federal entities, which have made the information available to the public on the Internet; thus, defendants had ready access to obtain the information. Based on the foregoing, defendants' motion to strike plaintiff's Exhibits 1 through 4 is denied.

Summary Judgment

In support of his claims seeking summary judgment and injunctive and declaratory relief under 42 U.S.C. § 1983, plaintiff states defendants have denied him the use and construction of a sweat lodge, in violation of RLUIPA. Plaintiff states use of a sweat lodge is a central tenet of his Native American religion, and that defendants' denial is based upon exaggerated security concerns.

In support of their motion for summary judgment, defendants state that accommodating a sweat lodge at JCCC, a maximum security institution, is a threat to safety and security within the prison and would adversely impact prison staff, other inmates and prison resources. Defendants state that institutional security is the most compelling governmental interest in a prison setting and that

based on the legitimate safety and security concerns associated with a sweat lodge, denial of use of a sweat lodge is the least restrictive means of ensuring prison safety and security. Defendants argue that denial of use of a sweat lodge does not violate plaintiff's First Amendment rights or RLUIPA.

Fed. R. Civ. P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op., 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the nonmoving party to go beyond his pleadings and show, by affidavit or by "depositions, answers to interrogatories, and admissions on file," that there is a genuine issue of fact to be resolved at trial. Celotex, 477 U.S. at 323. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact." Hass v. Weiner, 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this court must view all facts in a light most favorable to the nonmoving party, and

that party must receive the benefit of all reasonable inferences drawn from the facts. Robinson v. Monaghan, 864 F.2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," the court must grant summary judgment. Fed. R. Civ. P. 56(c).

Facts

Plaintiff Clifford Fowler is an inmate at JCCC. JCCC is a level 5 maximum security institution that currently houses 1,973 adult offenders. Offenders at Missouri level 5 maximum security institutions such as JCCC are incarcerated there because they have committed serious felonies; have committed a violent act while incarcerated; or are considered a security risk based on past records. Plaintiff is incarcerated for murder in the second degree and is serving a life sentence without the possibility of parole.

Plaintiff is of Cherokee descent and practices the Native American faith. Defendants do not challenge the sincerity of his religious beliefs. Plaintiff is part of the Native American religious group at JCCC, consisting of approximately six members. The Native American group is allowed access to the chapel for meetings twice weekly for two hours, at which they relay oral traditions and sing ceremonial songs, and have access to drums and other religious items, including a buffalo skull. Individual members of the Native American religious group are also afforded Native American spiritual items for individual personal religious use, such as a pipe, approved tobacco blend, a medicine bag, herbs,

head band, feathers and a dream catcher. Plaintiff, as a part of the Native American religious group, is also allowed to wear his hair long, as part of his spiritual beliefs. There is currently no Native American volunteer-in-corrections (VIC) to supervise or lead Native American groups at JCCC.

Plaintiff has sought additional spiritual accommodations at JCCC, including a request for an outdoor area for Native American religious use, to enable Native Americans to have direct contact with the earth during prayer and the opportunity to burn sacred plants, see Offender Grievance No. 04-651, dated Dec. 27, 2004, and Offender Grievance Appeal, dated Jan. 18, 2005, and use of and construction of a sweat lodge. See Offender Grievance No. 04-649, filed Dec. 27, 2004.

The use of a sweat lodge is a central tenant of the Native American religion. This is not disputed by defendants. A sweat lodge is a dome structure, constructed with 14 to 16 feet willow poles, measuring one and one-half inches in diameter, set in the ground and then bent over so that the poles attach to the poles on the opposing side of the dome. When constructed, the dome measures four feet tall, and eight to ten feet across, and can accommodate between 12 to 15 inmates. The willow structure is a permanent structure that needs to be replaced approximately every four years.

To set up for a sweat lodge ceremony, the willow dome is covered with blankets and/or tarpaulins. Firewood is used to start a fire. Thirty to forty rocks, the size of cantaloupes, are heated in the fire by participating inmates, outside the lodge, and

then are picked up with a shovel and taken to the doorway of the sweat lodge where they are picked up with deer antlers and set in the sweat lodge. A large bucket is used inside the sweat lodge to pour water over the rocks, producing steam. Once inmates are inside the lodge, there are four rounds which last from thirty minutes to an hour. During these rounds, the sweat lodge door is closed fifteen to twenty minutes of each round. An inmate participating in the sweat ceremony would be required to wear shorts or a towel wrapped around the lower half of his body. The typical sweat lodge ceremony would last six to seven hours from beginning to end.

Plaintiff's request for a sweat lodge has been denied by JCCC authorities. However, JCCC authorities state they are currently in the process of creating a separate, fenced, outdoor area to be used exclusively by the Native American religious group for their twice-weekly meeting times.

First Amendment Claim

Plaintiff's response to defendants' motion for summary judgment provides, in footnote 1, that he does not oppose defendants' motion as it pertains to any First Amendment claims. Under the First Amendment, reasonable restrictions may be placed on an incarcerated individual's religious practices. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). Therefore, summary judgment is granted in favor of defendants on plaintiff's First Amendment claims.

Religious Land Use and Institutionalized Persons Act (RLUIPA) Claim

Title 42 U.S.C. § 2000cc-a(a)(1)-(2) provides, in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest" and does by the "least restrictive means." Cutter v. Wilkinson, 544 U.S. 709, 712 (2005). This section applies to any program receiving Federal financial assistance. Id. at 715-16. Every state, including Missouri, accepts federal funding for its prisons. Id., n.4. Thus, section 2000cc-a(a)(1)-(2) is applicable to plaintiff's claims in the instant case.

Before enacting the standards set forth in RLUIPA, Congress enacted the Religious Freedom and Restoration Act (RFRA) to secure redress for inmates who encountered undue barriers to their religious observances. Id. at 716-17. RFRA was invalidated as applied to the states in City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997), because it lacked a Commerce Clause underpinning or Spending Clause limitation to recipients of federal funds. Cutter v. Wilkinson, 544 U.S. at 715. In response to City of Boerne v. Flores, Congress enacted RLUIPA and specifically invoked federal authority under the Spending and Commerce Clauses, thus ensuring applicability to the states. Cutter v. Wilkinson, 544 U.S. at 715. RLUIPA carried forward the "compelling governmental interest"/"least restrictive means" standard originally set forth in RFRA. Id. at 714-15, 722-23. Also carried forward with the standard was the application of "due deference to the experience and expertise of prison and jail administrators," by the courts in reviewing religious accommodation for prisoners. Id. at 723.

In Cutter v. Wilkinson, the Supreme Court upheld RLUIPA as constitutional, finding that it did not violate the Establishment Clause of the First Amendment as asserted by some courts. 544 U.S. at 709. The court held that RLUIPA alleviates exceptional government-created burdens on private religious exercise, but does not establish unyielding interests of religious accommodation over other interests, such that it would violate the Establishment Clause. Id. The Court held that the same due deference to prison and jail administrators in establishing necessary regulations and procedures to maintain order and security, as was provided under RFRA, was also applicable under RLUIPA. Id. at 723. The Court stated "[w]e do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety." Id. at 722. "[A]ccommodation must be measured so that it does not override other significant interests." Id. RLUIPA is to be applied in an appropriately balanced way, with particular sensitivity to security concerns. Id. While RLUIPA adopts a "compelling governmental interest" standard, "context matters" in the application of that standard. Id. at 722-23. The Act anticipates the courts will apply the standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." Id. at 723.

In Pounders v. Kempker, 79 Fed. Appx. 941 (2003), the Eighth Circuit held that the application of RFRA in Hamilton v. Schriro, 74 F.3d 1545 (8th Cir.

1996), to prisoner's sweat lodge claim was instructive on prisoner's sweat lodge claims under RLUIPA. In a subsequent opinion, the Eighth Circuit specifically stated that the standard applied in RFRA is the same standard to be applied in RLUIPA cases. Murphy v. Missouri Dept. of Corr., 372 F.3d 979 (8th Cir. 2004). These Eighth Circuit holdings are consistent with Cutter v. Wilkinson, 544 U.S. at 709.

The case of Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996), applied the RFRA in support of denial of a sweat lodge to a prisoner at the Missouri Department of Corrections maximum security prison in Potosi. The court held that while the denial of a sweat lodge to a prisoner practicing the Native American religion at the maximum security institution in Potosi did substantially burden the exercise of the prisoner's Native American religion, such denial was the least restrictive means of achieving the prison's compelling interest in safety and security. Id. at 1554. The court stated that the test of the least restrictive means/compelling state interest, when applied in the prison setting, must give due deference to expert judgment of prison officials in making appropriate limitations to maintain institutional security. Id. at 1553. The court cited Pell v. Procunier, 417 U.S. 817, 822 (1974), for the proposition that in the absence of substantial evidence in the record to indicate exaggeration by officials, courts should ordinarily defer to prison officials' expert judgment on matters involving the peculiar restrictive circumstances of penal confinement. Hamilton v. Schriro, 74 F.3d at 1553. The court, while recognizing that restrictions on religious accommodation should be no greater than necessary (least restrictive), noted that even

with "heightened" standard of review under RFRA, due deference to prison expertise of prison officials is necessary. Hamilton v. Schriro, 74 F.3d at 1554. The court cited institutional security and safety as central to all other corrections goals and the highest penological concerns. Id.

The facts in the instant case are virtually identical to those in Hamilton v. Schriro, and as set forth above, the analysis is also the same.

Defendants do not challenge the central importance of a sweat lodge to the Native American religion; rather, defendants cite unique security concerns that arise with a sweat lodge as the basis for denial of such accommodation to Native American religious group members. Under RLUIPA, defendants must show that the prison policies and regulations restricting use or construction of a sweat lodge are the least restrictive means of achieving a compelling state interest. There is no dispute that prison safety and security are compelling state interests.

MDOC's Compelling State Interests

MDOC defendants Steve Long, Assistant Division Director for the Division of Adult Institutions, and Arthur Wood, JCCC Associate Superintendent, have provided evidence in the form of affidavits setting forth the unique safety concerns associated with a sweat lodge. Specifically, the affidavits provide that in maximum security institutions, such as JCCC, where prisoners of heightened security risk based on their crimes committed, violent acts while incarcerated, or

security concerns based on past record, are housed, the construction and use of a sweat lodge creates unique security and safety concerns within the institution. MDOC officials state incidents of violence are known to occur at religious call-out times, with heightened risk in religious groups, such as the Native American group, which do not have regular VIC's leading the groups. MDOC officials set forth evidence that the sweat lodge ceremony involves offenders gathering in an enclosed area screened from view of those outside the lodge, and during which offenders tend a fire, handle firewood and large rocks, create hot steam and use tools, including shovels, and that these characteristics pose security risks. MDOC officials state that a sweat lodge's unique characteristics substantially heighten concerns regarding risk of assault against staff and among offenders, risk of sexual misconduct among offenders, risk of offenders planning organized disobedience against staff, risk that smoke from the sweat lodge being used to mask the odor of illicit substances, and risk regarding fire and heat-related safety concerns.

Plaintiff's argument that the safety concerns cited by MDOC officials are exaggerated and do not support the restriction on sweat lodges has been determined by the Eighth Circuit to be unfounded. The Eighth Circuit, in Hamilton v. Schriro, 74 F.3d at 1551, held that prohibiting inmates from meeting in a completely enclosed area is rationally connected to preventing the type of harm prison officers fear would occur in a sweat lodge. Almost identical evidence of safety and security concerns as that provided in Hamilton has been provided in this case.

Plaintiff has come forward with evidence that MDOC has previously accommodated a sweat lodge at the Potosi Correctional Center, and that federal prisons and some state prisons accommodate sweat lodges. This evidence, other than that concerning Potosi, was also presented in Hamilton and was held by the Eighth Circuit as insufficient to counter the evidence about security concerns submitted by MDOC prison officials. The evidence provided by plaintiff as to accommodation by MDOC at Potosi and by other federal and state prison institutions, while persuasive on the issue of accommodation, fails to provide evidence sufficient to counter the required deference given to the expert judgment of prison officials. See id. See also Pounders v. Kempker, No. 2:02CV49-DJS (E.D. Mo. 2004) (on remand from the Eighth Circuit, citing Hamilton in support of judgment finding legitimate security concerns justify denial of sweat lodge, no violation of RLUIPA).

Based on the precedent of this Circuit, and defendants' evidence, there is no dispute of material fact that MDOC's restriction on a sweat lodge is supported by the state's compelling state interest in safety and security.

Least Restrictive Means

Because there is a compelling state interest, the next issue under RLUIPA is a determination as to whether the denial of a sweat lodge in its entirety is the least restrictive means of achieving the state's compelling interest in safety and security within the prison. Plaintiff argues that defendants' safety and security concerns associated with the construction and use of a sweat lodge could be alleviated if MDOC

carefully screened maximum security inmates prior to allowing them access to the sweat lodge; if participants in a sweat ceremony exit the sweat lodge every thirty minutes; and if a volunteer could participate in the sweat ceremony. Despite such assertions, however, the evidence does not support that these restrictions would significantly and/or adequately reduce or remove the safety and security concerns defendants have with the unique nature of the sweat lodge ceremony. Defendants state that based on their experience and expertise, the unique safety and security concerns of a sweat lodge ceremony which arise from the completely dark enclosure in which prisoners are unsupervised for periods of up to thirty minutes at a time, and have access to items such as shovels, fire, hot rocks, deer antlers, etc., are not alleviated by plaintiff's suggestions. Further, plaintiff's assertion that security and safety concerns associated with a sweat lodge could be minimized by means of a Native American prison volunteer who could assist with supervision of the fire and within the sweat lodge during the sweat ceremony, is not supported by the evidence. Plaintiff has provided no evidence that such volunteer is available. Rather, the evidence is to the contrary; currently the Native American religious group at JCCC does not even have a Native American VIC to supervise or lead the Native American religious group's biweekly services at JCCC.

Plaintiff's request for a sweat lodge has been an all-or-nothing accommodation request. Plaintiff specifically requests full use of a sweat lodge at least 17 times a year. Defendants have set forth evidence that they have tried to accommodate other

alternative religious requests of plaintiff, but that they are unable to accommodate his all-or-nothing request for a sweat lodge. Defendants state they are in the process of constructing an exclusive fenced area for the Native American religious group for purposes of allowing the group to conduct outdoor religious services, as was requested by plaintiff in an Internal Resolution Request (IRR) form submitted to MDOC officials. Defendants state, however, that despite such accommodation, plaintiff asserts that he cannot utilize the outdoor area without being given access to a sweat lodge. In Pounders v. Kempker, No. 2:02CV49-DJS (E.D. Mo. 2004), on remand from the Eighth Circuit, the Eastern District of Missouri held that prisoner's all-or-nothing request for a sweat lodge was not subject to change, and thus, prisoner failed to come forward with any evidence that there were any less restrictive alternatives to a total ban on sweat lodges.

Based on plaintiff's assertion of an all-or-nothing religious accommodation for full access to a sweat lodge, and refusal to accept alternative accommodation by MDOC officials, there is no dispute of material fact as to whether a less restrictive means is available. Plaintiff has come forward with no evidence to support his claim that there are less restrictive means of achieving prison safety and security, other than completely prohibiting the sweat lodge ceremony.

Conclusion

Based on the precedent of this Circuit, there is no dispute of material fact which would require a trial in this matter. Although the denial of a sweat

lodge is a substantial burden on plaintiff's exercise of his Native American religion, Eighth Circuit precedent demonstrates that defendants' denial of a sweat lodge to plaintiff is in furtherance of a compelling governmental interest in safety and security in maximum security prisons and is currently the least restrictive means to ensure such safety and security. Taking the facts most favorable to plaintiff, no reasonable judge could distinguish this case from Hamilton v. Schriro, which held that denial of a sweat lodge at the maximum security prison in Potosi was permissible. Further, the Hamilton decision has been affirmed in Missouri by the Eastern District of Missouri in Pounders v. Kempker, No. 2:02CV49-DJS (E.D. Mo. 2004), which applied the precedent of Hamilton to its decision that denial of a sweat lodge to a Missouri prisoner did not violate the First Amendment of the Constitution or RLUIPA. Defendants are entitled to judgment on plaintiff's claims as a matter of law.

IT IS, THEREFORE, ORDERED that defendants' motion to strike is denied. [101] It is further

ORDERED that plaintiff's motion for summary judgment is denied. [91] It is further

ORDERED that defendants' motion for summary judgment is granted and plaintiff's claims are dismissed. [88]

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: July 23, 2007
Jefferson City, Missouri

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 07-2946

Clifford Charles Fowler,
Appellant
v.
Larry Crawford; et al.,
Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:05-cv-04212-NKL)

ORDER

Appellant Clifford Fowler's motion to consolidate this case with case No. 06-3473, Fegans v. Norris, for the purpose of en banc review has been considered by the court and is denied.

September 23, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 07-2946

Clifford Charles Fowler,
Appellant
v.
Larry Crawford; et al.,
Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:05-cv-04212-NKL)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 29, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Supreme Court, U.S.
FILED
FEB 6 - 2009
OFFICE OF THE CLERK

No. 08-855

In the
SUPREME COURT OF THE UNITED STATES

CLIFFORD CHARLES FOWLER,
Petitioner,

v.

LARRY CRAWFORD, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioner is Clifford C. Fowler, an inmate in the Algoa Correctional Center in Jefferson City, Missouri.

Respondents are the Missouri Department of Corrections and various officials at the Department of Corrections: George Lombardi (as successor to Larry Crawford), Tom Clements (as successor of Terry Moore), Mike Kemna (as successor of Steve Long),[1] David Dormire, Arthur Wood, and Robert Joe Gibson (collectively, the Department).

STATEMENT OF THE CASE

Procedural History

Fowler, at the time an inmate incarcerated in Jefferson City Correctional Center (JCCC), brought this action pursuant to 42 U.S.C. § 1983 for alleged violations of his First Amendment rights and pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. In his original complaint, Fowler sought to have correctional officials provide him with an outdoor area and to construct a sweat lodge at JCCC for his use. In Fowler's First Amended Complaint, he dropped his request for an outdoor area, maintained his claims regarding the sweat lodge, and added claims regarding the alleged confiscation

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[1] Fowler sued the individual defendants in their official capacities. Larry Crawford has recently left his position as Director of the Department and was replaced by George Lombardi. Tom Clements has succeeded Terry Moore, and Mike Kemna succeeded Steve Long. Thus, pursuant to Fed. R. App. P. 43(c)(2), Lombardi, Clements, and Kemna are now defendants in this lawsuit.

of some religious items. Fowler also added claims for punitive damages against the Department and its officials.

The district court dismissed Fowler's claims regarding the confiscation of his religious items and his claims seeking punitive damages pursuant to 42 U.S.C. § 1983. (ECF Doc. No. 82). Both Fowler and the Department moved for summary judgment. In responding to the Department's motion for summary judgment, Fowler did not oppose judgment against him on his First Amendment claims, nor on any claims he had for punitive damages that were not already dismissed. (SJA 406 n.1). Accordingly, the only issue left for the district court to decide on summary judgment was Fowler's claim pursuant to RLUIPA seeking the construction and use of a sweat lodge at JCCC. The Honorable Nanette Laughrey determined that there was no dispute of material fact that would require a trial, denied Fowler's motion for summary judgment, and granted summary judgment for the Department. On appeal, the Court of Appeals for the Eighth Circuit affirmed.

Background

JCCC is a maximum security institution that houses approximately 1,973 adult offenders. (SJA 332, 373). Offenders at JCCC are incarcerated there because they have committed serious felonies; have committed a violent act while incarcerated; or are considered a security risk based on past records. (SJA 332-333, 373). Fowler is incarcerated in the Department for murder in the second degree and is serving a life sentence. (SJA 333, 401, ECF Doc. No. 1 at 1).

Fowler's Request for a Sweat Lodge and Outdoor Area

Fowler practices a Native American faith at JCCC, and according to his testimony, is of Cherokee descent. (SJA 380, 383). In addition to the practices already available to those who practice a Native American faith, Fowler requested further spiritual accommodations at JCCC, including an outdoor area to enable him and others who practice with him to have direct contact with the earth during prayer and to have the opportunity to burn sacred plants. *Id.* He also requested the construction and use of a sweat lodge. (SJA 92).

Native American Faith Practices Available to Offenders at JCCC

Offenders at JCCC who choose to may practice their Native American faith through both group and individual practices. (SJA 333, 350, 370). As a group, those offenders in general population who practice a Native American faith can meet twice a week, for two hours at each meeting. (SJA 333, 370). At these meetings, the group has access to drums and other religious items, including a buffalo skull. (SJA 333, 370, 395). The offenders use these meetings to relay oral traditions and sing ceremonial songs. (SJA 334, 381). Though in the past these meetings were confined to the nondenominational chapel area, subsequent to Fowler's request, officials at JCCC have worked to create an outdoor area that the group may use during their twice-weekly meetings, weather permitting. (SJA 334, 371, 375, 403).

The Native American faith group consisted of approximately six members. (SJA 334, 388). There is no volunteer-in-corrections (VIC) to supervise or lead this faith group's meetings at JCCC. (SJA 371).

Offenders may also practice their faith individually. (SJA 333, 350). They may possess numerous Native American items in their personal property, including: an individual pipe, an approved tobacco blend for personal use, a medicine bag, herbs, feathers, and a dream catcher. (SJA 333, 371). They may also wear their hair long, in accordance with their spiritual beliefs. (SJA 334, 383).

Description of the Sweat Lodge & Ceremony

The sweat lodge Fowler requests is a domed structure, approximately four feet tall and eight to ten feet across. (SJA 335, 387). It is formed by bending willow poles, which are approximately fourteen to sixteen feet long and an inch and a half in diameter. (SJA 335, 386-387). During ceremonial use, the poles are covered with a blanket and a tarp. (SJA 335, 389). It can accommodate between 12 to 15 inmates. (SJA 388).

The sweat lodge is a semi-permanent structure that would need to be replaced every four years. (SJA 335, 387). Fowler demands that the sweat lodge be used a minimum of seventeen times a year, depending on the lunar cycle. (SJA 335, 384-385). Each ceremony, called a sweat, would take from six to seven hours, from beginning to end. (SJA 335, 385-386).

During the ceremony, approximately thirty to forty rocks, each the size of a cantaloupe, are used. (SJA 335, 391-392). Offenders use firewood to build a fire, on which the rocks are heated. (SJA 335, 394). As a spiritual part of the ceremony, offenders tend the fire. (SJA 335, 392-393). Once the cantaloupe-sized rocks are heated, offenders pick them up with a shovel and take them to the door of the sweat lodge, where they are picked up with deer antlers and set inside the sweat lodge. (SJA 336, 390-391). Once the offenders are inside the sweat lodge, there are four rounds, which last from thirty minutes to an hour each. (SJA 336, 397). The door of the sweat lodge is closed for fifteen to twenty minutes of each round. (SJA 336, 396-397). During the ceremony, offenders use a bucket to pour water on the heated rocks to create steam. (SJA 336, 388, 396). Participants in the ceremony are clothed in shorts or a towel wrapped around the lower half of the body (SJA 336, 398-399).

Institutional Concerns about the Construction and Use of a Sweat Lodge

Incidents of violence have occurred at religious call-out times, with a heightened risk in religious groups not led by a Volunteer in Corrections. (SJA 374). For instance, offenders have used religious programming time to engage in sexual misconduct and to organize violence. (SJA 374, 595-598). The nature of the sweat lodge ceremony, particularly the fact that it is not openly visible to security personnel, heightens these security concerns. (Roper dep. 42:10-19, 55:3-4 at SJA 556, 558; Moore dep. at SJA 600-601; Long dep. 51:17-52:16 at SJA 564). The smoke from the sweat lodge also presents the risk that the scent will be used to mask the odor of illicit

substances. (SJA 374). And the items used in the sweat ceremony, including hot, cantaloupe-sized rocks, a shovel, and deer antlers, can be used as weapons. (SJA 558).

The six to seven hour sweat lodge ceremony, requested by Fowler is longer than the typical two-hour religious meetings held in JCCC, and would affect the way the institution keeps count of those offenders who participate in the ceremony. (SJA 375). In addition, extending additional programming to one group of offenders, and not to all offenders, presents a risk of creating resentment among the offender population, leading to heightened tension and the potential for unrest and disturbance among offenders. (SJA 375).

Building and maintaining a sweat lodge and facilitating sweat lodge ceremonies would consume considerable institutional financial and personnel resources. The extended program time required for the sweat lodge ceremony would expend many institutional personnel hours. (SJA 375). The labor-intensive nature of the sweat lodge activities diminishes the ability of staff to respond to security concerns and supervise inmates in other areas of the prison. (Roper dep. 45:17-47:21 at JA 556-557).

Sweat Lodge at PCC

Potosi Correctional Center (PCC) is a maximum security prison about half the size of JCCC. (Pet. App. 10). For over ten years, PCC operated a sweat lodge in fall and spring, with numerous restrictions, including that the sweats were supervised by a Native-American specialist, and then later, a Volunteer in Corrections;

supervision included taking care of the wood and rocks. (JA 68; SJA 448). PCC was selective in the inmates who were allowed to participate in the sweat lodge. screening out inmates who had poor institutional adjustment and a certain number of conduct violations. (SJA 448). The sweat lodge at PCC was discontinued due to security concerns, especially after a correctional official was stabbed in ar incident unrelated to the sweat lodge, as well as because of staffing cuts. budget issues, and inmate screening. (JA 68-72; SJA 378; Pet. App. 10).

RESPONSE TO REASONS TO GRANT PETITION

This Case is Moot

In his First Amended Complaint, Fowler sought only injunctive relief: to be transferred from JCCC to PCC, which, at the time was operating a sweat lodge; or to be allowed to have a sweat lodge at JCCC. But Fowler is no longer incarcerated at JCCC; as of December 30, 2008, Fowler is incarcerated at Algoa Correctional Center.

A request for injunctive relief from any conditions of confinement is moot after a transfer to another prison. *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975); *see also Owens v. Isaac*, 487 F.3d 561, 564 (8th Cir. 2007) (citing *Martin v. Sergeant*, 780 F.2d 1334, 1337 (8th Cir. 1985)).

As Fowler is no longer at JCCC, his case is moot and his petition for certiorari to this Court should be denied.

There is No Circuit Split in how the Courts of Appeals Interpret RLUIPA

Less-Restrictive Alternatives

All circuits cited by Fowler – including the Eighth Circuit – follow this Court by applying the same standard in RLUIPA cases: strict scrutiny, but with due deference given to prison officials. *See Cutter v. Wilkinson*, 544 U.S. 709, 722-23 (2005); *Spratt v. Rhode Island Dept. of Corrections*, 482 F.3d 33, 38-39 (1st Cir. 2007); *Washington v. Klem*, 497 F.3d 272, 277, 283-84 (3d Cir. 2007); *Greene v. Solano Co. Jail*, 513 F.3d 982 (9th Cir. 2008); Pet. App. at 12-14.

Fowler claims that the First, Third, and Ninth Circuits require prison officials to demonstrate that they considered and rejected less-restrictive alternatives, but that the Eighth Circuit does not. (Petition at 12-13). This is simply not true. While the different circuits may not use the exact same language, they all require prison officials to show that they considered and rejected alternatives to the challenged policy. *See Spratt*, 482 F.3d at 41; *Washington*, 497 F.3d at 284; *Greene*, 513 F.3d at 989; Pet. App. at 19-20. Applying that standard, the Eighth Circuit in this case explicitly found that the Department considered alternatives – most of which were rejected by Fowler. (Pet. App. at 19-20). And the evidence presented by the Department supports that finding.

The Department suggested and implemented alternatives, such as an outdoor area and medicine wheel, but Fowler rejected all these alternatives; he will accept nothing less than a sweat lodge at JCCC

to be used a minimum of seventeen times a year. (JA 44). Additionally, the Department had operated a sweat lodge at a different prison – and operated less frequently and under more restrictive conditions than Fowler wants – for several years before discontinuing it due to security concerns after a corrections official was stabbed. Thus, the Department not only considered alternatives, it also tried one before finding it unworkable. (SJA 378).

Moreover, nothing in cases from other circuits show that they would have decided this case any differently than the Eighth Circuit did. Indeed, several of the other circuits have cited Eighth Circuit RLUIPA and RFRA[2] cases with approval, including *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996), the case relied on by the Eighth Circuit here. *See Spratt*, 482 F.3d at 41; *see also Washington*, 497 F.3d at 238; *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (citing *Murphy v. Mo. Dept. of Corrections*, 372 F.3d 979, 186, 190 (8th Cir. 2004)).

The cases from other circuits cited by Fowler contained vastly different scenarios, both procedurally and factually. In those cases, prison officials had presented no evidence to support the compelling government interest or the least restrictive alternative. Instead, the allegations as to why the policy was necessary were merely conclusory. *See Spratt*, 482 F.3d at 39-41; *Washington*, 497 F.3d at 284; *Lovelace*, 472 F.3d at 190-91. Here, the Department produced significant

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[2] RLUIPA is the successor to RFRA, the Religious Freedom Restoration Act, and courts have used the same standard in analyzing cases brought under both statutes. *See Cutter*, 544 U.S. at 715-17.

evidence – including testimony from numerous prison officials listing specific examples of violence and sexual misconduct at religious callouts – that supported its assertion that there was a compelling government interest at stake and that their policy banning sweat lodges was the least restrictive alternative.

Further, the religious practices in the other cases were far less dangerous than the one at issue here. The other religious practices included group religious worship services, including Bible studies (*Greene*); inmate preaching (*Spratt*); keeping more than ten books in inmate property (*Washington*); and Ramadan meal accommodations (*Lovelace*). In fact, the First Circuit in *Spratt* distinguished its case from another in which it was "quite easy to see how armed prisoners" would cause a security problem. *Spratt*, 482 F.3d at 39 (citing *Ruiz v. Estelle*, 503 F.Supp. 1265, 1294-98 (S.D. Tex. 1980)).

But here, the sweat lodge would involve maximum security inmates having access to: fire; hot, cantaloupe-sized rocks; shovels; and deer antlers. The inmates would also be totally secluded in a small space that does not allow for any surveillance for six to seven hours at a time, a minimum of seventeen times a year. Common sense dictates that such practices would be a significant security risk. Indeed, as the Eighth Circuit noted, "no reasonable jurist, affording due deference to prison officials can dispute that serious safety and security concerns arise" from allowing maximum security inmates items that can be used as weapons while they are in "an enclosed area inaccessible to outside view." (Pet. App. at 17).

Fowler's main objection to the Department's policy is that he does not believe the alternatives suggested by the Department are true alternatives. (Petition at 19-20). Fowler's opinion notwithstanding, the Eighth Circuit found that the Department did consider and reject alternatives. (*Id.*). Simply because Fowler does not like the alternatives presented to him does not mean they are not viable alternatives. In Fowler's view, nothing less than a sweat lodge operated according to his requirements is acceptable; thus, an option that does not give him what he wants is not a true alternative. That would put the Department in the position of capitulating to Fowler's demands – regardless of the Department's legitimate security concerns. That is not what RLUIPA requires, nor are prison officials and the courts required to defer completely to the inmate's point of view.

There is nothing in the cases cited by Fowler to support his assertion that there is a circuit split. The First, Third, Fourth, Eighth, and Ninth Circuits apply RLUIPA using the same standard and all would have undoubtedly come to the same conclusion in this case.

Burden Shifting and Deference

Fowler claims that this Court's "due deference" language in *Cutter v. Wilkinson* led to a split among the Circuits as to the amount of deference given to the government. (Petition at 14-19). Fowler also claims that this deference has led to a split as to which party bears the burden under RLUIPA. (*Id.* at 15).

According to Fowler, in the First, Third, and Ninth Circuits, due deference does not impact prison officials' burden under the strict scrutiny standard. (Petition at 15). But, Fowler asserts, the Eighth Circuit focuses on deference to prison officials such that the Eighth Circuit applies a lesser standard than strict scrutiny. (*Id.* at 16). It appears that Fowler is conflating burden shifting with due deference, but this argument mischaracterizes what happened below.

As to the amount of deference given to prison officials, this Court in *Cutter* found that the courts must balance the religious practices of inmates with the government's compelling interests, such as security. *Cutter*, 544 U.S. at 722-23. And the courts have been doing exactly that: balancing the competing interests based on the unique circumstances of each case. The courts have given deference to prison officials' expertise and experience, but have not rubber-stamped prison officials' decisions. *See Spratt*, 482 F.3d at 40; *Lovelace*, 472 F.3d at 190.

And there is nothing in the Eighth Circuit's opinion in *Fowler* to show that the district court improperly shifted the burden of proof. This case was decided on summary judgment. (Pet. App. at 2). Accordingly, under Federal Rule of Civil Procedure 56(e), once defendants produced evidence in their motion for summary judgment, the burden of *production* shifted to Fowler for his summary judgment response. The burden of *persuasion* always remained with the Department. (Pet. App. at 20-21). Fowler did not counter the Department's evidence sufficiently to create a genuine issue of material fact that would preclude summary

judgment. (Pet. App. 42-43). There was no improper shifting of the burden of proof.

There is no circuit split in the amount of deference given to the government, nor with respect to the allocation of the burden of proof. The Eighth Circuit correctly applied this Court's standard from *Cutter*. There are no grounds to support granting certiorari in this case.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

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No. 08-855

In The

Supreme Court of the United States

CLIFFORD CHARLES FOWLER,

Petitioner,

v.

LARRY CRAWFORD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Eighth Circuit

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INTRODUCTORY REMARKS

Before addressing the substantive issues raised in Respondents' opposing brief, Petitioner must digress to correct certain misstatements regarding the record below. Respondents contend the Eighth Circuit's opinion in this case held the Missouri Department of Correction's ("MDOC") sweat-lodge policy satisfied RLUIPA, in part, because MDOC attempted to provide a sweat lodge at another maximum-security prison, but was unsuccessful in its efforts. This misstates conceded issues of fact. MDOC conceded it operated a sweat lodge for 13 years without incident at a maximum-security facility. (Roper Dep. pp. 15, 43, 47-48) (JA-66, 69, 70). MDOC acknowledged that the policy change leading to the statewide sweat-lodge ban resulted from a stabbing incident having nothing to do with any religious accommodation, much less the operation of a sweat lodge. (Roper Dep. pp. 41-43, 56-58) (Moore Dep. p. 13) (Long Dep. p. 25) (JA-26, 51, 69, 71).[1] Respondents' representation that the Eighth Circuit viewed their successful operation of a sweat lodge at a maximum-security facility as evidence that MDOC satisfied RLUIPA is therefore incorrect.

Substantively, Respondents raise two arguments in their opposing brief: (1) Fowler's

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[1] As the Eighth Circuit stated: "Notably, MDOC's Potosi Correctional Center (PCC) at one time authorized a by-yearly sweat lodge ceremony only to discontinue it later. . . Donald Roper, PCC's Superintendent, stated that PCC discontinued operating the sweat lodge in 2006 due to increasing security concerns amidst a guard stabbing at the prison." App. at 10.

RLUIPA claim is moot because he has been transferred to a new facility, and (2) the divergent circuit court interpretations of RLUIPA's strict-scrutiny standard are simply semantical differences without substantive import. As explained herein, both arguments are inaccurate. Moreover, Respondents' mootness argument elucidates another circuit split in need of resolution: whether money damages are available under RLUIPA.

DISCUSSION

I. Fowler's RLUIPA Claim Is Not Moot.

A. Petitioner Fowler Is Still Subject to the Same Challenged Policy.

As Respondents point out, MDOC transferred Fowler to a new facility—Algoa Correctional Center ("ACC")—during the pendency of this appeal. However, this does not make Fowler's RLUIPA claim moot. Transfer of an inmate moots his challenge to a prison policy or condition only where he is transferred to a different location and "is no longer subject to the challenged policy, practice, or condition[.]" *Incumaa v. Ozmint*, 507 F.3d 281, 286-7 (4th Cir. 2007); *Smith v. Hundley*, 190 F.3d 852, 855 (8th Cir. 1999). Here, Petitioner Fowler has been transferred from Jefferson City Correctional Center ("JCCC") to ACC—another MDOC facility. As the Petitioner's Brief makes clear, MDOC has banned sweat lodges at all of its facilities—including ACC. As Petitioner Fowler is subject to the same challenged policy, his RLUIPA claim is not moot. *See Smith v. Allen*, 502 F.3d 1255, 1267 (11th Cir. 2007) (Inmate's RLUIPA claim was not moot where he had

been reincarcerated and was subject to the same offending policy). *See also U.S. v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (Case not moot where allegedly wrongful behavior could be reasonably expected to recur).

B. Petitioner Fowler Seeks All Relief Available, Including Money Damages, Under RLUIPA; There Is a Circuit Split Over Whether RLUIPA Permits Money Damages.

At the outset of the underlying litigation, Petitioner Fowler filed a Complaint against the Defendant/Respondents, alleging in relevant part the RLUIPA violation at issue here. In connection with that claim, Petitioner Fowler prayed for judgment "for injunctive and declaratory relief; for punitive damages sufficient and necessary to punish the Defendants and to deter others from like actions; for attorneys' fees, costs, and disbursements as allowed for under 42 U.S.C. § 1988; and for such other and further relief as the Court deems just and equitable." (First Amended Complaint, at WHEREFORE clause following ¶ 51). Thus, Petitioner Fowler states a claim for appropriate relief under RLUIPA, including money damages. Because such claim includes one for monetary relief, it is not mooted by Fowler's transfer. Moreover, it highlights another critical circuit split this Court must resolve.

By its text, RLUIPA provides that a prevailing party may "obtain *appropriate relief* against a government." 42 U.S.C. § 2000cc-2(a) (emphasis added). However, the question of whether "appropriate relief" includes money damages is still

unanswered. "To put it mildly, 'there is a division of authority' on this question." *Allen*, 502 F.3d at 1270 (quoting *Madison v. Virginia*, 474 F.3d 118, 130 n. 3 (4th Cir. 2006)). Some courts believe the Eleventh Amendment—governing sovereign immunity—precludes recovery of money damages. However, other courts hold otherwise, finding the acceptance of federal funding constitutes waiver of the Eleventh Amendment for purposes of RLUIPA.

The Eleventh Circuit has concluded that the Eleventh Amendment does not bar claims for monetary damages under RLUIPA. *Allen*, 502 F.3d 125. In *Allen*, the Eleventh Circuit held:

> [I]n *Benning*, we held that section 3 of RLUIPA effectuated a clear waiver of the state's sovereign immunity under the Eleventh Amendment. We held that RLUIPA's statutory language, conditioning the receipt of federal funds on adherence to the statute and providing that a plaintiff may seek "appropriate relief" when the statute is violated, made clear that "by accepting federal funds, [the state] waived its immunity under RLUIPA," and found that "Congress unambiguously required states to waive their sovereign immunity from suits filed by prisoners to enforce RLUIPA." In light of that holding, **we conclude that the Eleventh Amendment will not shield the state (and its agents) from an official capacity action for damages under RLUIPA.**

Id. at 1276 (emphasis added) (internal citations omitted). Thus, according to the Eleventh Circuit, money damages may be awarded against a state and/or a state official under RLUIPA. Numerous district courts have reached similar opinions. *See, e.g.*, *Allen*, 502 F.3d at 1270 (citing *Shidler v. Moore*, 409 F.Supp.2d 1060, 1067 (N.D. Ind. 2006); *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 326 F.Supp.2d 1140, 1161-62 (E.D. Cal. 2003); *Chase v. City of Portsmouth*, No. 2:05CV446, 2005 WL 3079065, at *5 (E.D. Va. Nov. 16, 2005); *Presley v. Edwards*, No. 2:04-CV-729-WKW, 2007 WL 174153, at *13 (M.D. Ala. Jan. 19, 2007); *Gooden v. Crain*, 405 F.Supp.2d 714, 723-24 (E.D. Tex. 2005); *Charles v. Verhagen*, 220 F.Supp.2d 937, 938-39 (W.D. Wis. 2002)).

In contrast to the Eleventh Circuit, the Fourth Circuit Court of Appeals and some other federal courts hold that RLUIPA does not permit money damages against a government or its officials. *See, e.g.*, *Madison v. Virginia*, 474 F.3d 118, 132 (4th Cir. 2006); *see also Allen*, 502 F.3d at 1270 (citing *Boles v. Neet*, 402 F.Supp.2d 1237, 1241 (D. Colo. 2005); *Decker v. Ferrero*, 475 F.Supp.2d 1325, 1337 (N.D. Ga. 2007)). Thus, in *Madison*, the Fourth Circuit held: "RLUIPA's 'appropriate relief against a government' language falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages." 474 F.3d at 131 (citing *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992)). Specifically, the Fourth Circuit stated: "Had Congress wished to effect a State's waiver of Eleventh Amendment sovereign immunity from suit for damages as a consequence of accepting federal

funds, it could easily have expressed that intention." *Id.* at 132.

The circuit split evident by the Eleventh and Fourth Circuit decisions is significant in that it subjects inmates to varying potential recoveries depending solely on the circuit in which they assert their RLUIPA claims. To the extent RLUIPA permits money damages, Petitioner Fowler's money damage claim is not moot and will not be moot even if he is released from prison. *See, e.g.*, *Church of Scientology of Cal. v. U.S.*, 506 U.S. 9, 13 (1992) ("The availability of [a] possible remedy is sufficient to prevent this case from being moot."). The Court should, therefore, resolve the dispute.

II. The Eighth Circuit Reads RLUIPA to Require Rational-Basis Review; All Other Circuits Require Strict-Scrutiny Analysis.

Respondents' argument denying a circuit split with respect to RLUIPA's strict-scrutiny standard misconstrues the Eighth Circuit's opinion in this case. The circuit split at issue relates to a heavily-litigated statute affecting the free-exercise rights of millions of citizens and is not, as Respondents contend, merely a difference in semantics. The Eighth Circuit's interpretation of RLUIPA's least-restrictive means requirement relieves the government of considering and ruling out less-restrictive alternatives to the actual religious exercise being affected so long as the affected inmate has some "other means" to practice his or her faith, irrespective of whether the "other means" is a spiritual substitute for the religious exercise affected by the policy at issue. The Eighth Circuit's holding

that the governmental policy under review satisfies RLUIPA at summary judgment so long as "other means" exist for the adherent to practice his religion in general transforms RLUIPA's text into *Turner's* rational-basis formulation. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987) (balancing whether "alternative means of exercising the [religious] right . . . remain open to prison inmates"). Eroding a central protection conferred under RLUIPA is not an issue of mere semantics.

Indeed, the Ninth Circuit's analysis of RLUIPA in *Greene v. Solano County Jail* accentuates the structural flaw in the Eighth Circuit's interpretation of RLUIPA. 513 F.3d 982, 989 (9th Cir. 2008). *Greene* addressed whether a prohibition against group worship in a maximum-security prison was permissible under RLUIPA. In *Greene*, the state advocated the same reading of RLUIPA that the Eighth Circuit adopted in this case: because the "religious exercise" subject to strict scrutiny under RLUIPA was, broadly, Greene's ability to practice Christianity, not the group-worship policy Mr. Greene challenged (i.e., in this case, Fowler's Native American faith, not the sweat-lodge prohibition), and because Greene had other avenues available to practice his faith, the subject policy satisfied RLUIPA. *Id.* at 987-99. The Ninth Circuit rejected this reading of RLUIPA because the relevant religious exercise being challenged was group worship, and not more generally whether Mr. Greene had some avenues to practice Christianity. *Id.* Whether, apart from group worship, "alternative means for exercising [Greene's] religion remained available to [him]" was irrelevant to whether the government satisfied strict scrutiny, which required

demonstrating what less-restrictive alternatives it had considered to *the group-worship ban*. *Id.* at 987. The Eighth Circuit, however, adopted the exact interpretation of RLUIPA the Ninth Circuit rejected in *Greene*: because MDOC offered Fowler some alternatives to practice his Native American faith (albeit ones that require him to violate tenets of his faith), MDOC passed strict scrutiny, notwithstanding its failure to consider less-restrictive alternatives to a blanket sweat-lodge prohibition. This is a clear circuit split this Court must resolve as various circuits read RLUIPA to provide different levels of constitutional scrutiny.

CONCLUSION

This case implicates two circuit splits relating to the proper interpretation of RLUIPA: (1) whether RLUIPA's strict-scrutiny standard is the legal equivalent of the *Turner* test, a form of rational-basis review, and (2) whether RLUIPA permits a claim for money damages. The Court should grant Fowler's petition for certiorari and clarify the proper interpretation of RLUIPA on these issues.

Respectfully submitted,

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